MINUTES

PLANNING COMMITTEE

March 19, 2014

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Tim Bynum, Chair, at the Council Chambers, 4396 Rice Street, Suite 201, Līhu'e, Kaua'i, on Wednesday, March 19, 2014, at 10:35 a.m., after which the following members answered the call of the roll:

Honorable Mason K. Chock, Sr.
Honorable Ross Kagawa *(present at 11:45 a.m.)*
Honorable JoAnn A. Yukimura
Honorable Mel Rapozo
Honorable Tim Bynum
Honorable Gary L. Hooser, Ex-Officio Member
Honorable Jay Furfaro, Ex-Officio Member

The Committee proceeded on its agenda item, as follows:

Bill No. 2461 — A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8, KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO THE COMPREHENSIVE ZONING ORDINANCE *(Amendments to the Shoreline Setback Ordinance)* ***(This item was deferred.)***

Mr. Rapozo moved to approve Bill No. 2461, seconded by Ms. Yukimura.

Chair Bynum: Just one correction, Mr. Kagawa a member of the Committee is not present at this time. But there is a quorum and I am going to turn the floor over to Vice Committee Chair Yukimura.

Ms. Yukimura: Thank you, Chair Bynum. I can either introduce this amendment or just have a discussion of it. If you want me to introduce it, I would like you to keep the Chair's role and let me introduce it. Let me just say upfront that the intention is this is the result of months of work and it is quite complex so my intention is to lay it out and the team that has been working on this Bill is here to do it today, at least most of the members or many of the members. We would like to present it and take you through it, have questions answered and then have public speak and that may include members of the team.

Chair Bynum: Thank you, Vice Chair. The Planning Committee Vice Chair is Ms. Yukimura and I will turn the floor back to her. My preference as Chair would be that we introduce the amendment, have them presented, then allow for public testimony and so I concur and with that being the parameters I turn the floor over...

Ms. Yukimura moved to amend Bill No. 2461 as circulated as shown in the Floor Amendment which is attached hereto as Attachment 1, seconded by Mr. Chock.

Committee Chair Bynum, the presiding officer, relinquished Chairmanship to Ms. Yukimura.

Chair Bynum: And with that I will turn the floor over to Planning Vice Chair Yukimura.

Ms. Yukimura: Thank you. I would like to, if it is alright Mr. Chair, to start with a couple of slides, while we are waiting for the amendment. Thanks to Ruby Pap and Doland Eversole for these slides. This is very recent, December 2013 on the North Shore of O'ahu, Rocky Point. Do we have a couple more? Sorry, okay, thank you. As you can see there is...the ocean is starting to take away the houses and this is what the Bill before us is trying to prevent. The Bill is called the Shoreline Setback Law and we are amending an existing law which was passed first in 2008 and then subsequently amended. It graphically shows the problem we are trying to avoid and so how we manage our coastline, how we site structures is really the key to preventing these things from happening. I just wanted to start out with our main goal.

Thank you and now we have the proposed amendments and I want members of the public to get them too. We will have them to you shortly. May I say a few words before I call up members of the team to explain and discuss these amendments? The preparation of these amendments, they are amendments to Bill No. 2461, which were sent to us by the Planning Department. The preparation has been a marathon for those involved. It started more than a year ago when former Planning Committee Chair Nadine Nakamura took on the responsibility of working out amendments to the Bill. I was Vice Chair of the Planning Committee at that time and the introducer of the first Shoreline Setback Law which was passed in January 2008 so I had an interest in the amendment. Committee Chair Nakamura and I decided to work on it together and then when Nadine left to be Managing Director then the responsibility fell on me to finish the work. Thankfully Councilmember Nakamura had pulled together a great team of stakeholders from all sides who have been stellar in their expertise, collaborative spirit and commitment to creating a fair, effective, and well functioning Bill. The team has included our Planning Department representatives, our Planning Director, Michael Dahilig, and Kaina Hall, who are present today, our County Attorney's Office who is represented by Ian Jung and our legal representative from the Council is Peter Morimoto. The developer and landowner were represented by Max Graham, David Arakawa of the Land Use Research Foundation, Tom Shigemoto and Avery Yuon. Have I missed anybody Aida? And then from the community, Caren Diamond who is in the audience who first came to me to initiate the first County Ordinance. Caren came to me in 2003, it took us four (4) years to get the Bill on the agenda and it was passed in 2008. Caren has three (3) successful Supreme Court cases to her name. That indicates her involvement in shoreline issues. These Supreme Court cases all dealt with the shoreline. And then Barbara

Robeson also represented the community, Barbara is a former Planning Commissioner and as you all know North Shore activist, if she does not mind me using that term. Then we had Sea Grant experts and professionals, Ruby Pap who is attached to the Planning Department here and also Doland Eversole and attorney Dennis Wong. Dennis wrote this book, *The Hawai'i Coastal Handbook Mitigation Guidebook* and was a key participant in the development of the first Ordinance. Then of course we had our legislative analyst and legal drafter par none, Aida Okasaki. We had over eighteen (18) meetings over the last year. Most of them two (2) hours, some of them four (4) hours long and the last meeting was last Friday, which went from 9:00 a.m. to 4:00 p.m. because this is a highly complex subject about an area of the island that everyone loves and uses often, the coastline, the shoreline, the ocean, the part of our island where people live, play, and a place of great economic social and spiritual value. I am pleased to present the results of our work. It is hard fought, hard earned agreement in most places. There are some places where I had to make the call as the introducer of the amendment but the final call will be made first by the Committee and then by the Council.

If we could suspend the rules and call up representatives of the team, so Ian will be doing an overview and then I am going to ask Ruby and Mike to join us, and Caren. So we will have an overview and then a discussion with Council asking questions and team members. Could you all come up? I will take Ian first and then Chair, I will let you take the public input and then as I mentioned the intention is to defer this matter so people will have two (2) weeks to absorb and consider the amendments and then we will come back in Committee to vote in two (2) weeks. The two (2) weeks will also give us time to do any fine tuning because the draft was put together in the last three (3) days based on last Friday's discussions and we could have overlooked something. If we did I apologize to the Committee but I am sure that will come out and there will be time to change.

There being no objections, the rules were suspended.

IAN K. JUNG, Deputy County Attorney: Good morning, members of the Committee, Deputy County Attorney, Ian Jung. Unfortunately I got the difficult task to try and conceptualize the twenty (20) potential floor amendments that you guys are going to be looking at but I think before we get that I kind of wanted to do just a brief background of why we are here. I think Councilmember Yukimura looked at that issue but the reality is we need figure out how to draw this line. The line in the sand and then where that setback is going to be created to have a "no build" zone. By way of outline let us take a look at what a setback is. Background on the Fletcher study and then the stakeholder amendments and obviously a summary of what is going to be looked at and then I think everyone else will chime in at that point.

What is a setback outline? We will look at the general definition, Hawai'i Revised Statutes (HRS) 205A, shoreline process, the current County program and then proposed County program. This comes from one of our local case law here, from the Brescia v Northshore 'Ohana. And the Court defines a setback as nothing more than a minimum amount of space required between a lot line and building

line. In the simplest context that we can look at it, we refer to it as the no build area. There are always exceptions to this rule and there are certain circumstances where there are structures that can be permitted within the setback area. And I will illustrate what the setback area will be in an upcoming slide. When you look at the framework of laws that established the setback rules, rule making ability you look at HRS 205A which is part of the Coastal Zone Management Protection Act and part 3 is the relevant section regarding where you go to determine what setbacks are going to be. So we look at HRS 205A part 3, you have the State Shoreline Program. The intent of that is to establish a no build line and the way the law is currently written is not less than twenty feet (20') but no more than forty feet (40') and the agency that is charged with administering this program is the Office of Coastal and Conservation Lands (OCCL) under the jurisdiction of the Department of Land and Natural resources (DLNR). One of the key ingredients to this framework is that you can actually go, by County rule you can go higher than forty feet (40') that was previously established by H.R.S. so you can, and we have been and are continuing to go beyond the forty feet (40') maximum illustrated in HRS.

Mr. Rapozo: Excuse me, Mr. Chair. Do we have a copy of this presentation? Do we have a hard copy available?

Mr. Jung: We do. We have to make copies.

Mr. Rapozo: Maybe we could get copies.

Ms. Yukimura: So just to explain that we went till 4:00 p.m. yesterday and Ian had to put that together overnight. So sorry we do not have...we did not make it.

Mr. Jung: Here is the scenario we are looking at. We have a County lot. What are the parameters of buildable zone here? You have the triangles up there meant to be trees and then those squiggly lines are meant to be the ocean. So what happens is you have a State certified shoreline, and then I will give an introduction of how the State process works. You have a State certified shoreline which is done under the jurisdiction of DLNR and then you can outline where that line is and the two (2) most recent cases, and we now refer to as Diamond 1 and Diamond 2 basically explained how the State gets to this particular area, this particular line. The next line that is critical for County implementation of following that State certified shoreline and it creates the setback line of where the structures can go beyond what the setback is going to be. In between those two (2) lines we call it under the current Ordinance, the Shoreline Setback Area. This is the critical no build zone and obviously there is an asterisk there because there are situations built in within the code and within HRS that allows for certain structures inclusive of minor structures to be permitted in that area as well as the possibility for a variance to be applied for to put structures within that area. But the key to this framework is also the requirement for a 343 document. So if anyone is going to propose any project proposed to be in that no build zone triggers the requirement for a 343 document, in an Environmental Assessment (EA).

So what is the shoreline process? And this is in the most basic terms for a real complicated set of regulations. Step 1 is you go to the County to do an evaluation of the proposed structure in a zoning permit. So if you apply for a permit the front staff will look at whether or not it is going to be applicable to the shoreline setback rules. If you are applicable, step 2 is you go to the State DLNR to get you shoreline certification determination. And then step 3 you come back to the County once you have the initial line from the State to basically calculate where that line is going to be to create your setback line. The current program now is you have a structure activity on abutting or non-abutting lots if it is applicable, you move down the chain. If it is not applicable you are done. If it is applicable, you do that shoreline survey and you hire a surveyor to go out and do the survey for you. Then you submit an application inclusive of that survey that goes to OCCL and then they will do the shoreline certification program which could include site visits and a whole host of documents because they look at it from a multi-variable approach. Which again Diamond 1 and Diamond 2 have illustrated how to do that approach. Once you get that line, it can be appealed to the Board of Land and Natural Reasources (BLNR) because it is the Chairperson that makes the determination if the determination is appealed it goes to the Board of Land and Natural Resources for disposition. If it is not appealed then it can come back to the County for a shoreline setback determination and then that is when this Ordinance becomes applied. Currently the way it works is all shoreline setbacks are ratified by the Planning Commission. So they technically have to accept the determination made by the Planning Director. The proposed County program, and again this is very simplistic and I will let the other members of the group explain their perspective on it, but what the fundamental shift is in terms of the applicability section is trying to create an improvement space approach. So looking at where that structure is going to be versus whether the lot is abutting or non-abutting. At first you are looking at where is the structure going to be located and to identify where it is going to be located we created this threshold buffer zone. So anything within five hundred feet (500') for abutting lots or five hundred fifty feet (550') as proposed to within non-abutting lots. If you intend to put a structure within that buffer zone you are going to be subject potentially to this Ordinance. That is the minimum threshold. The way Maui does it, they just have shoreline area so it is not very defined but we are trying to take that extra step to define where that threshold area is going to be.

Ms. Yukimura: Do you have more slides or is this it?

Mr. Jung: There are more slides but I am just kind of walking through the process.

Ms. Yukimura: Okay.

Mr. Jung: When you get to the applicability section there is going to be, and you will see when you go wade yourself through the amendments, there is basically a two (2) step analysis you are going to have to do. There is now a...I guess I will refer to it as a bright line approach and then you have a discretionary approach and we can get more into discussion on that. If you

meet the bright line approach and you show that you are not susceptible to any type of coastal hazard or erosion then you potentially could be *pau* in terms of being not applicable. Or if the Planning Director makes a determination based on a set of factors that are outlined in the applicability section that you are not applicable then you could also be *pau* but if it turns out that you are applicable then you move to the next step which we just illustrated. The shoreline survey done by surveyor, certified by OCCL and the Chairperson at DLNR and if that is not appealed then it goes back down to County. Now the County process, we are doing a fundamental shift on that as well in terms of how to calculate that setback. What we are looking at is doing a cumulative approach in terms of using the erosion base setback calculation as well as the average lot depth setback calculation recommended by Seagrant and then what you will do is take the greater of those two (2) and it is illustrated in the table in one (1) of the amendments. Once you get that line the greater of the two (2) will be your setback line. Then that section is broken up into two (2) sections: 1) for areas where there was the coastal erosion study and 2) for areas where there was no coastal erosion study and I am going to pop the next study as the Fletcher study so I am going to just jump over there.

Ms. Yukimura: Ian, I might point out that in the handout, did we pass this out to every Councilmember? That shows the two (2) formulas you just discussed.

Mr. Jung: Correct. It looks complicated but that verbiage there is the easiest way that can be explained by Sea Grant who provided that document.

Ms. Yukimura: Okay, go ahead, thank you.

Mr. Jung: In the last section there where we are making a change in terms of an administrative review approach is we are creating now and appellate process, so it will follow the same format that DLNR uses where the Planning Director makes the determination so it does not necessarily have to go up to the commission for action. What it does it for notice requirement it will be posted on a website, any determination by the Planning Director with regard to a shoreline setback determination for applicability or a determination of what the setback is going to be will be a decision by the Planning Director however the Planning Director will now be required to post it online and then also notify the Commission on its agenda. So you get noticed online and then noticed through the County six (6) day requirement for Sunshine Law requirements. That decision will not be final until that Commission day but if someone wants to appeal that decision, they can do that but they have to file their appeal before or on the date of when the Commission actually gets notified that the determination has been made. So we are creating the framework where similar to the State on how DLNR does it but if there is an appellate process then it goes to the full Commission for file disposition.

That is it in a nutshell and I know it is complicated but we are going to get into a little more specifics here but I think Mike did a great background on the Fletcher study which I hijacked from his slides but basically what happened is the

County of Kaua'i commissioned the study to be done, to look at coastal erosion rates. The draft study was delivered in 2007 and it was intergraded into the original Ordinance which is 863 and then the subsequent amendments which were 887 but the final study was delivered in 2010, and that is what has been intergraded into this particular Bill. As you may recall, some of you Councilmembers may recall there is an original proposal by the Planning Department to implement it which was received by the Council and then this one was introduced, I believe in 2012, based on Mike's new approach to this. This is now the second version of trying to implement the coastal erosion study that was done by Dr. Fletcher. The aim is obviously to provided policymakers and public shoreline change data to assist with decision making in that particular shoreline area. This is essentially what the map looks like. You can go online to take a look at this and you will see the blocks there are the certain maps but the way it is identified is there are certain transects in each area on pictometry or Geographic Information Systems (GIS) which you can take a look at and some areas where actually not studied by this particular study, certain rocky areas and things like that and that is why in the new setback calculation provisions we are going to have to accommodate for where the shoreline study was done and where the shoreline study was not done. This speaks for itself but basically identifies how they got to the transects.

Trying to conceptualize the twenty (20) floor amendments that are before you, one (1) floor amendment with twenty (20) amendments it was basically done into six (6) categories. The first one (1) is obviously is what, the intent of why we are here. To look at protective, protect life and property. To ensure longevity, integrity of Kaua'i's coastal and beach resources. The other one is to look at how to incorporate the science based erosion which is the Fletcher study. To actually finally adopt and implement it into law. And the third one is to align the shoreline setback ordinance with the County Flood Ordinance relative to how you look at substantial improvement and certain repairs of certain structures. And the fourth is to look at episodic shoreline erosion. I think this is critical because this even strengthens the Bill even more. Previously you had the erosion rate times seventy (70) times forty (40) but now you are adding an additional twenty feet (20') for an additional buffer for this episodic and potential sea level rise issue. It is strengthening the Bill by adding and additional twenty feet (20') to that current calculation.

Ms. Yukimura: I would like to add that the slides we saw at the beginning were the result of an episodic high wave, extremely high wave season situation.

Mr. Jung: Right. Number five there are recent amendments to Chapter 205A in terms of what was exceptions to what was prohibited in the shoreline setback area. Basically what we did is aligned our current Ordinance with the current amendments that were just passed in 2013 and then number six is to give the Planning Director flexibility in applying the law to large parcels that abut the shoreline. That is essentially why the five hundred foot (500') threshold was created, for large lots where could be susceptible to the applicability section but if improvements are well outside the potential coastal

hazard then they would not be applicable, meaning by being outside that five hundred foot (500') threshold. Looking at the current Ordinance and I use the current Ordinance to make it a little more clear on what we are working off but the current version is in Ordinance 935 of the Kaua'i County Code which was the Comprehensive Zoning Ordinance (CZO) update but these sections remain the same. As you can see there are fourteen (14) subparagraphs to these Ordinances. Working through this Ordinance in terms of the working group is very difficult because I think Mike called it the rubix cube, once you tinker with one section you are going have to tinker with the other sections to accommodate for that tinkering. So Tinkerbell would have a great time with this Ordinance. If you are looking at the applicability section and how things apply, you are going to have to start adjusting definitions, you are going to have to start adjusting how you establish the setback line and then looking at what the minimum setback requirements will be in terms of doing that setback calculation. It is all going to have to flow together and that is why it is critical if there are any floor amendments that come out of this we are going to have to basically reconcile those floor amendments with the current proposal from the Planning Commission so it can be all harmonized so there are no problems with "discontinuity" I guess would be the proper word. We can do one (1) of two (2) things now, I can give a short summary of all the proposed twenty (20) amendments or you guys can take your time and look at it. I sort of highlighted the important things so it is up to you.

Ms. Yukimura: I think I would like to have the core pieces of the Bill explained. Let us go over the applicability section and the shoreline setback determination. At least those because the shoreline setback determination is the heart of it, right? Determining that no build or that setback area.

Mr. Jung: Just with regard to amended section one (1) and two (2), that is basically dealing with the findings and purpose section. So what you are doing here is there are some amendments to the finding and purpose section but I think there is some insight that we felt was necessary to become a part of it all so you are taking a part of the applicability section and making it the law itself. Starting with the applicability section on page three (3) and four (4).

Ms. Yukimura: It is at the bottom of three (3) so it is really four (4).

Mr. Jung: So as I described what is happening here now is you are taking an improvement or a structured based approach versus just a straight lot based approach. You are using the structured based approach to try harmonize situations where there would be abutting lots or non-abutting lots. For cases where there is an abutting lot you are going to have a threshold of five hundred feet (500'). If your structure is within that threshold then you are subject to it unless you meet sections one (1) and two (2) which are described. Options one (1) deals with this so called bright line test, where you are looking at three cases where the Federal Emergency Management Agency (FEMA) map, you are not in a firm V or VE flood zone and the site is located at an elevation which is twenty feet (20') above mean sea level or greater and the applicant can demonstrate to the

satisfaction of the Planning Director that the property is adjacent to a rock shoreline. I think critical to this analysis is the definition of rocky shoreline. If you look at the definition of rocky shoreline it basically says non-erodible shorelines. So you have a three (3) part threshold in terms of what to look at to first determine if something is going to be exempt.

Ms. Yukimura: Do you want to add something, Caren?

CAREN DIAMOND: Yes, I think I may on applicability.

Ms. Yukimura: Only after we finish, maybe. Let us finish explaining the whole thing. Okay?

Mr. Jung: Looking at number 2, the second exception of when you may be determined to be inapplicable, this basically gives the Planning Director a limited discretion in terms of how to look at potential structures that will not have any adverse affect on beach process, and what was taken from the original Ordinance 863 is the factors. Which the factors to be considered shall include but not limited to are 1) proximity to the shoreline; 2) topography; 3) properties between the shoreline and the applicant's property; 4) elevation and; 5) history of coastal hazards in the area. So whoever is applying for a permit to be essentially exempt will have to illustrate those factors to show that they are not susceptible to any type of coastal erosion or hazard.

Mr. Rapozo: I have a question, just a clarification.

Ms. Yukimura: Just the last part and then we will clarify.

Mr. Jung: The last part is "b" and Caren was instrumental about bringing this action forward is if any project is determined to be exempt from this, the minimum setback that they are going to have is forty feet (40'). We want to make sure that there is a standard setback of forty feet (40') that will be applied to any project that is determined inapplicable to this particular Ordinance.

Ms. Yukimura: I know Councilmember Rapozo and Councilmember Bynum had questions. I want to go to Caren though first and then go to your questions, if that is okay. Caren.

Ms. Diamond: Thank you. You know we were a large group and I wanted to say that Barbara Robeson and myself were the ones that represented the public perspective and so I wanted to give you the public perspective on applicability right now. Basically, we do not agree with the way this is written and feel like the applicability should be applicable to everyone. We do not feel that there should be exemptions or that the vertical exemptions that were put in are protective of the County or of setbacks or that they comply with HRS 205 in our coastal zone management laws require of the County. If you look at the diagram as it went to it, if you were not applicable you were *pau* and that means

you are *pau* and then there is this last statement from Ian that because of me they put in this forty foot (40') minimum setback but you are *pau* and so there is no forty foot (40') minimum setback, there is no applicability to this Ordinance if you are deemed not applicable to this Ordinance and so what we are doing is saying there are not shoreline rules and regulations. Ruby, and I will pass this out if Ruby approves, it is her work. She had put together, basically, who would be inapplicable to shoreline rules and regulations? It is some six hundred sixty-seven (667) properties along the coast of Kaua'i in some of the most beautiful coastal areas. The shoreline erosion study that was done only did the sandy beaches. It does not mean that there are no coastal hazards on rocky beaches. It does not mean that on the rest of the island where there are bluffs there are not high waves, and there are not dynamic shorelines underneath them. Ordinance 863 had an applicability section that was well written and we recommend that you go back to that without the exemptions. One more thing that happened in this applicability section, HRS also requires the County to setback and to look at their shoreline rules and regulations for structures and activities, and activities were taken out of the Bill throughout this entire Bill so that there are no activities anymore in our shoreline rule and regulations.

Ms. Yukimura: I want to put the activities issues aside. We are going to address that later.

Ms. Diamond: It is part of applicability though. It was not mentioned.

Ms. Yukimura: Well, perhaps but we have to divide things up so we do not get really tangled up. So we will go to questions from Councilmember Rapozo.

Mr. Rapozo: So I am assuming that in example number 2, in cases where the applicants propose structure or subdivision will not adversely affect beach processes but affected by or be affected by or contribute to coastal hazards or impact that this determination would be made by Planning Director?

Mr. Jung: Correct.

Mr. Rapozo: And there would be no public opportunity?

Mr. Jung: There would be.

Mr. Rapozo: There would be?

Mr. Jung: Yes, under the new process the determination of inapplicability would be made and then referred over to the Planning Commission through a notification process and then in that period of time where it is posted on the web and notified to the Planning Commission there can be an appeal of that decision to basically challenge the Planning Director's determination of inapplicability. The thing is that we will have to amend and

accommodate for this in the...if this is approved, in the Planning Commission rules because Maui did their shoreline setback via rule so it is a little easier for them to accommodate but because this is an Ordinance, if this changes we then have to accommodate for these changes with the Planning Commission rule of procedure.

Mr. Rapozo: So that would require an action taken by the public to appeal?

Mr. Jung: Correct.

Mr. Rapozo ...versus having the public input before the determination is made?

Mr. Jung: Yes, but the final determination would not be done until it noticed on the Commission agenda. So if someone wanted to come and testify at the Commission agenda it could but they would still have to follow the appeal procedure.

Mr. Rapozo: But is this subject to the Police Commission approval?

Ms. Yukimura: Planning Commission.

Mr. Rapozo: I mean...what did I say?

Ms. Yukimura: We can tell...police.

Mr. Rapozo: Sorry. Would this determination be subject to the Planning Commission approval?

Mr. Jung: No, because the determination would is made prior.

Mr. Rapozo: And that I guess that is my questions.

Ms. Yukimura: The decision will be subject to the Planning Commission's final decision. It does not take effect because the public member can appeal then it would be thrown into the Planning Commission.

Mr. Rapozo: Yes, I understand that, but an appeal cost money. Does the appeal not cost this County money? I mean we are talking about Diamond 1 and Diamond 2, she has done pretty well in court and I am saying that if we can elevate...in other words John Q. Public would have to file an appeal versus having an opportunity to speak at the time this determination is made, if the determination would be subject to Planning Commission approval then the public would have an opportunity to vet their concerns at the Planning Commission meeting. Then the Planning Commission would make a determination if they are going to agree with the Planning Director.

Mr. Jung: And this is a policy issue but it becomes a legal issue when we are trying to formulize the procedures to allow for the appellate process but I will let Mike chime in from this perspective.

MICHAEL A. DAHILIG, Director of Planning: Councilmembers, just to address the issue of when does the public get their notification that this process is moving forward. We have, in a sense believe that a two (2) step process is appropriate so on intake we actually have to put up these applications that are coming on intake online. There is a notification to the public that these things are coming through the pipeline and then there is a second notification process, and this is written in the Bill, where both, it is posted on the Planning Commission agenda so it is Sunshine as well as posted up online. The model behind the Commission notification for public notification purposes kind of tracks what the University of Hawai'i does with respect to salaries of high ranking officials. The call is made by the president of the university but at the end of the day the public can come in and see what the salary is before anything is finally and official. So we have kind of taken that model that is prescribed by State law to really, wholly involve the public by providing two (2) points of notification.

Mr. Rapozo: Right, notification and involvement are two (2) different things there. I guess that is my concern. You have a three (3) step process but if they do not have an input until the point where they have to basically contest this versus having some input prior to the decision being made, I guess that is what I am looking at.

Mr. Dahilig: And that is certainly a valid concern. One (1) problem we run into is that if the Commission is the final decision maker under the (inaudible). If the Commission makes a determination the recoures for that is a court action and what we are trying do is bring back and allow the public to have an administrative proceeding available versus having the Commission actually be the one appeal to the Circuit Court. We at trying to bring that efficiency as Ian mentioned through the process by not subjecting the public to a court process.

Ms. Yukimura: How much does it cost to appeal? Is there a fee attached to appealing?

Mr. Dahilig: There is a nominal fee. Off the top of my head I...fifteen dollars ($15)?

Ms. Yukimura: One (1) five (5)?

Mr. Jung: For the intervention it is fifteen dollars ($15).

Ms. Yukimura: Fifteen dollars ($15). This is an improvement over the existing? The existing right now does not allow any appeal except in court.

Mr. Rapozo: I understand JoAnn but I remember at the last budget, I think it was a the budget or maybe one ordinance or the update on the TVR, we talked about contested cases and how much the budget would have to be increased if we go to contested case because we have to go hire someone or whatever the case. I guess, for me, I am trying to alleviate that, if we can get the public input in the process itself versus having to have the public go file an action that is where I am coming from.

Mr. Jung: I think at the end of the day it is going to be...the issue that is going to be present is whether or not something is applicable or not. Because at the end of the day if you are calculating the setback line, as you will see there is predetermined calculations that will have to apply. If there are any type of clerical error or something that was done in the calculations, if someone brings that to attention then that can be adjusted. But from the standpoint of what theoretically can be appealed are going to be determinations relative to applicability and the certain minor structures that might be allowed within the permitted setback area.

Mr. Rapozo: I guess the concern is that the discretion by a person and it is not Mike personally. It is just the Planning Director at the time. I can tell you that a few years ago Councilmember Yukimura would not allow this language. I am telling you. It is just the discretion, how wide is the discretion? Is that discretion tied to any kind of scientific requirements?

Ms. Yukimura: That is a very good question and what is happening is through the erosion control and these formulas the discretion is quite narrowed.

Mr. Rapozo: Well I have yet to see that. I just got this today so I am not sure what ties the discretion or what.

Ms. Yukimura: I noticed Max Graham is in the audience and I just want to invite him up front too since the developers are landowners were part of the team. Mel thanks for your questions. I think Tim first and...unless it is separate and it is a follow-up. Is this related to this, Gary?

Mr. Hooser: It is related to something said earlier. It can wait.

Ms. Yukimura: Can we get one (1) more chair, I know it is a little crowded. One (1) more chair over there. Ian, you need a seat too. Thank you Eddie, I am sorry. Be careful, watch your back.

Mr. Rapozo: Councilmember Yukimura, item one (1) is very specific. It is very objective. It is very clear, sub 1, sub 2 and sub 3, it is very clear so it is objective. Number 2, in my opinion is quite subjective and that is my concern and I do not know if that is addressed later in this amendment. Like I said

I just got it this morning so I have not had the opportunity to review the amendment yet.

Ms. Yukimura: The applicability...

Mr. Jung: If I could...I know everyone fears subjectivity but the problem is when you deal with Kaua'i's coastal shorelines, not all the lots are created equal. There are going to be a ton of variables, different types of approaches you are going to have to deal with when you are doing the analysis. Some could have, like Anini, where you have the outer bank reef and then some rocky headland and then the roadway and then the lot behind of it. All of those would have to be taken in to consideration versus if you look at Wainiha where there is real susceptible erosion that is taken on a different standard. The subjectivity, I think is critical but if you guys need to narrow it that is obviously a possibility.

Mr. Rapozo: I want to be consistent and I know Mike may be the best Planning Director on the planet but is he versed in erosion, is he versed in what you just talked about, the outer reefs and the banks versus what is being presented. Than is my concern, is making sure that there is some objectivity, some kind of scientific data that justifies in fact that it is okay to build because I think Caren is right, this can put a house forty feet (40')...put a structure forty feet (40') from the certified shoreline, this exemption. Right? Forty feet (40')?

Mr. Jung: Not necessarily. You have to go through the factors.

Mr. Rapozo: I understand but if you qualify under section 2 this ordinance is not applicable. If you come in under...that is why I say applicability, the ordinance is meaningless if it does not apply.

Mr. Jung: Well here is the thing though, if you go through the process and it determines that you have zero (0) lot line. Your average lot depth is large enough potentially your setback is going to be forty feet (40') anyway so the process is do they have go spend the money to do a survey, go through the State certified shoreline process and then come back around, at the end of the day your setback is going to be forty feet (40') anyway because you are on a rocky shoreline. That is the policy call you guys are talking about.

Mr. Rapozo: The rocky shoreline comes under number 1, sub 3. I am not asking about number 1, sub 3. Like I said, that one is very objective.

Ms. Yukimura: You have be really high though.

Mr. Rapozo: So you either get exempted out of number 1 or number 2, I am not questioning because number 1, obviously if you can demonstrate you are on an unerodible shoreline then yes, you should be applicable.

I mean my gosh, it is not going to erode but I am not talking about section 1, I am talking about section 2. So section 2, the applicant comes in and he basically convinces the Planning Director that I should not be applicable. I do not see, and again, maybe it is later, I do not see the criteria to grant this inapplicability.

Mr. Jung: The criteria that is here now was the same criteria that was in the original Ordinance. If we need to tinker with that, that is up to you guys.

Ms. Yukimura: It was, maybe for non-abutting though, I think.

Mr. Jung: Non-abutting, right.

Ms. Yukimura: And this one will apply to all abutting and non-abutting. I want to go to Tim's question because it is related to Councilmember Rapozo's question and we will just continue this. We are not coming to any conclusion yet but good questions, thank you.

Chair Bynum: I have not had time to read through this so I have only heard what you have presented but in terms of this applicability, some cases has to meet this standard and then the Director makes a determination, right? The Director notifies his determination and then that notification, the public is aware of, the landowners are aware of, correct? And then either the public or the landowner can appeal that, correct?

Mr. Jung: Yes.

Chair Bynum: So if the determination is "this is applicable", the landowner if they disagree could disagree and have an appeal?

Mr. Jung: Correct.

Chair Bynum: And the trigger for that is if they ask for an appeal they get it, right? And same with any member of Kaua'i public, they see a problem with this they ask for an appeal, they get it? Is that correct?

Mr. Jung: There are standing issues but that is why we are going to have to formulate the rules, if this is approved, formulate the Planning Commission rules to accommodate for a specific section relative to the Shoreline Setback Ordinance to accommodate for that.

Chair Bynum: The rules would presumably allow any organized community group, like a neighborhood association?

Mr. Jung: Standing rules are relatively flexible.

Chair Bynum: But then it goes to the Planning Commission and then they determine?

Mr. Jung: Correct.

Chair Bynum: So the two (2) steps are...and then the purpose of this, as I understand it is that you are anticipating that many of these will not be challenged by either because the community groups, neighboring landowners, other interested parties who might have standing and a landowner all agree with the determination of the Planning Director. You are anticipating that will happen frequently?

Mr. Jung: Since I have started staffing the Planning Commission, two (2) challenges to setbacks of, I do not know how many we do a year. Mike, what do you think? But there is usually two to three (2 – 3) each Planning Commission so if there are twenty-four (24) Planning Commissions, maybe, estimate about fifty (50).

Chair Bynum: Fifty (50) would be appealed?

Mr. Jung: Fifty (50) shoreline setbacks a year and only two (2) have been challenged from what I have seen in the last three (3) years.

Chair Bynum: Because there would be no purpose of having a two (2) step process if you did not anticipate that a large number of the determinations will not be challenged, correct?

Mr. Jung: Correct.

Chair Bynum: And so the two (2) step process makes sense to me but regardless of the determination, virtually anyone can challenge this to the Planning Commission. Which is what is currently happens on their current Ordinance, you automatically go to the Planning Commission for variance, right?

Mr. Jung: Everything goes up for acceptance by the Planning Commission now. If you are looking at formally, and I think Caren could probably speak to this, most of the challenges, the two challenges that I have seen have come at the State Certified Shoreline level first where there is an appeal and then...

Chair Bynum: Which would happen prior to this?

Mr. Jung: ...prior to this. The problem is if they do not file a stay with the Circuit Court, where the action is, it still comes to the Planning Commission so it is sort of convoluted when you get to...

Chair Bynum: So then the Planning Commission has routinely approved many of these because there was no opposition?

Mr. Jung: Correct.

Chair Bynum: You are answering my questions, thank you. I mean that is related to this and I have tons of other questions but I do not think we got the entire presentation, right?

Ms. Yukimura: We did on applicability. That is all we are talking about. We did on applicability. We are still on applicability and...

Chair Bynum: I want to yield the floor but I may have other questions related.

Ms. Yukimura: Okay, fine. Councilmember Hooser.

Mr. Hooser: I am not on the Committee but I am happy to be here listening and so thank you. Thank you for all of the hard work all of you have done on this. Ms. Diamond, you mentioned that, yourself and former Commission member Barbara Robeson do not support the amendments that were here and you stated some of those concerns. My question is specific because I do best with specifics, will you be presenting another report or alternative amendments that would be specific to this document to make it a little easier for some of us?

Ms. Diamond: I actually have not read the amendments. They came this morning as we were coming up to sit here so I have not seen or actually gotten the final draft and so I only, kind of know what was expected.

Ms. Yukimura: Do you have a copy, though?

Ms. Diamond: I have a copy right now.

Ms. Yukimura: That is what got...

Ms. Diamond: There was much of the Bill that we do support and so a lot of it is okay. A lot of it we supported, actually what was in Ordinance 863. The last couple of conversations that you guys were just having, the original version of Ordinance 863, handled those in a way that was better and I would ask that you look to the old Bill and some of it does not need to be changed. In that fifty (50), ones that nobody came and challenged the two (2) challenges were different than to the setback...

Mr. Hooser: If I could just interrupt you for a second. The heart of my question is will you be putting something in writing suggesting specific amendments that we could then use as a guiding light rather then just take the verbal testimony?

Ms. Diamond: Sure. While we cannot bring amendments and only you can we will bring our suggestions to you.

Mr. Hooser: Great. Thank you so much.

Ms. Yukimura: You have a question? Thank you.

Chair Bynum: I just heard that the Vice Chair's intent is that we hear the salient issues. I feel like Ms. Diamond has made clear on this issue, stick with the current language and do you have more to present? Is that correct? I am going to defer to the Vice Chair how far she wants to go with this dialogue but I thought the intent was to present all of the issues, have a clear thing and then defer this for what will clearly now be a fairly lengthy Committee meeting, right, in the future?

Ms. Yukimura: Will it depends on how many issues...

Chair Bynum: Having said those things, I will defer back to the Vice Chair. I am hoping that we do not go over this length on each issue if the intent is to defer today. That is all I wanted to interject. Thank you.

Ms. Yukimura: Thank you. I just want to be clear. I think it is important today to flush out all of the issues and in the next two (2) weeks actually prepare specific amendments, which we will then take up in two (2) weeks. To try to get an understanding both on what we agree on and the reason for it and then where there might be some disagreements and amendments may be proposed. I want to finish up on applicability. I think we are almost done on that and go then to...I think the next important one is how the setback determinations are done to lots that are deemed to come under this Bill or law. But I want Mike to explain the need for discretion on abutting lots. I want Mike to explain that and I want to also say before he says anything that number 2, in cases were applicants proposed structures, subdivision will not adversely affect beach processes. This applies now to abutting lots so, lots that are right on the shorelines but if there is any chance that it can be affected by coastal processes, affect public access or anything I would guess that the Planning Director would subject it to shoreline determinations. It is only when he says "there is no way," and there are people who have said "there is no way" and maybe you can explain those "no way" situations.

Mr. Dahilig: One (1) of the things that we have been running into, challenges with the current law that is in the books are these bucket of improvements that really are not going to affect the shoreline, either by the nature of the structure itself or spatially that it is outside of a hazard area. I think that the amendment proposal does address part of that issue with respect to the five hundred foot (500') zone that Ian is continuing to mention about. That a quarter mile inland on a lot that abuts a shoreline should not have to go through the lengthy process of having to go to OCCL and get a shoreline certification. But there are also things that are within this hazard area that could be characterized as structures but really do not need the type of scrutiny for shoreline certification and setback determination. Mainly things like showers at beach parks, or things like walkways. There are a lot of these things that are generally are not hardening,

they are not impeding the natural flow of sand but could the nature of it being a structure then fall into this category of having to go through what is a pretty extensive process.

Ms. Yukimura: Mike, those are minor structures, right? So that is another way of exempting but if it is like a golf clubhouse, which is a major structure and it is on an abutting lot, say Kaua'i Lagoons and it is twelve hundred (1,200)...you said a quarter of a mile, so thirteen hundred feet (1,300') in land and up high, then you folks have come to us and said they still have to get a shoreline certification and do all of that, right? And this discretionary provision allows you to say you do not have to because it is not affecting, the structure itself is not affecting coastal...

Mr. Dahilig: That is the tandem element of the five hundred foot (500') area of study as well as things like, as Ruby just quietly mentioned here, things like interior renovation. That could be characterized not as a minor structure but something where you have, let us say an abutting golf course with a golf pro shop that needs interior renovation or kitchen installation. By the way that the law is currently written these are things that could theoretically trigger the law and we are actually going before the Planning Commission and submitting to the Planning Commission these determination of no affect to say just because you are abutting we need to go through this process. We can probably write laws that address ninety to ninety-five percent (90% - 95%) of all the situations but there are these bandwidth of issues that we have from an intake and processing standpoint have been hitting that really do need some level of a call. Either it should be applicable or should not be applicable.

Mr. Rapozo: I have a question.

Ms. Yukimura: Yes, go ahead.

Mr. Rapozo: Mike, right now you are saying with the current law if the Wailua Golf Course wanted to do interior improvements to the kitchen they would require a shoreline certification? I do not think so.

Ms. Yukimura: No, and I do not want to mix....

Mr. Rapozo: JoAnn, can he answer please?

Mr. Dahilig: What happens is they come in for a call and we have to administratively make a call because the way phrase "structure" is set up. They do not have to go through the actual drawing of the line or whatever.

Mr. Rapozo: That is why...that is what you just said. Be careful because the public watches this and I want to make sure the public gets an accurate picture. You said that this is to help like if the golf course needs to renovate they do not need to go through the whole process but that is not the case.

Mr. Dahilig: Currently, right now and so it is...there are things from the administrative standpoint hit our Planning Commission.

Mr. Rapozo: I understand. The reality is, and this is why I am concerned because if we want to and we have seen it at Kapa'a park, we have seen the bathroom end up in the water, we have seen the pavilion and the grills end up in the ocean and that is my concern is when, and it is not just for the private developers, it is for our own County that we put something in here like this and because the use is only a restroom or whatever it is that we can build as close to the ocean as we want. That is what I am worried about.

Ms. Yukimura: I do not think that interior renovations are a good example. That is covered and there are other ways to exempt small things. We are talking about the major applicability section and I understand what your concern is. You have to look at the wording and maybe we should not put the wording in but in cases where the applicants proposed structure or subdivision will not adversely affect beach processes be affected by or contribute to coastal hazards or impact public beach access excluding natural disasters. A pavilion located within fifty feet (50') of the shoreline or even one hundred feet (100') you cannot say will not affect so I am with Councilmember Rapozo that this section will not allow you to exempt that.

Mr. Rapozo: And I would say that he could. Because he could use his rational that says it will not.

Ms. Yukimura: Well I am more concerned about when we talk about what is permitted use and we say permitted use are government facilities, okay? So we will come to that issue but we are talking applicability at this point and that has to be the large cases where it may be affected.

Mr. Rapozo: The other thing Councilmember, where it says what needs to be considered, the history of coastal hazards in the area, we have to understand too that this study that was done by Fletcher, a lot of the areas were based on historical photographs.

Ms. Yukimura: Yes, so?

Mr. Rapozo: Do you acknowledge that?

Ms. Yukimura: It is historical data.

Mr. Rapozo: Correct. Photographs. They took old photographs and they drew a shoreline and the time the photo was taken may not have been on the time that the current photo was taken and there are beaches here, according to his study that tells me that shorelines are accreting when we know for a fact that it is not but it is based...it is a scientific study because they are using the information that is available. So if they took a photo in 1948 at a time where the beach was at high tide and they took a photo in 2010 at the same beach that was at

low tide obviously when you put that in the computer it is going say that the beach is accreting. I think that is why...

Ms. Yukimura: I do not think it is that simple and Ruby can you address that?

RUBY PAP: I am not sure specifically what your question is about the Fletcher study. Can you clarify?

Mr. Rapozo: It was not a question it was a comment that the historical data, unless you are taking the high wash of the waves back in 1948 and the high wash of the waves in 2012 there is going to be a margin of error.

Ms. Pap: Certainly, there is uncertainty with the data. The number of shorelines that were taken for the Fletcher study since 1926, I do not have the exact number but they were determined to be statistically significant scientifically so that you could come up with a long term average rate but they do come with error bars that can be...but it is based on the best available science right now recognizing that it is based on historical data and not future sea level rise and things like that but there are other components of the Bill that address those areas of uncertainty.

Mr. Rapozo: I am just using that as applicability clause that in fact we have to be cognizant of that because I can tell you historical data which is the best that we had but I know a lot of historical people here on Kaua'i that have lived here for fifty (50), sixty (60), seventy (70) years that can tell me that the data or that beach was not accreting. A specific beach is not accreting. It is in fact eroding but the study says it is accreting. I think that is where I am hitting it. Although it is the best information that we have and it is scientific you have to be cognizant of that fact that in fact it may not be as accurate as we would like it to be.

Ms. Yukimura: Well we are using the data as the basis of our setback as the best available data but we are adding twenty feet (20') on top of the forty feet (40') minimum to account for the uncertainty in a conservative way toward the protection of life and property.

Mr. Rapozo: For properties that are applicable.

Ms. Yukimura: For properties that are applicable.

Mr. Rapozo: We are on applicability which I am saying...

Ms. Yukimura: That is right. That is why talking about the Fletcher study does not really apply to this applicability study section.

Ms. Pap: Just to add one (1) more thing, the reason I did not go further into it I was planning on doing a full explanation of how the setback is calculated when we get to that section. We were talking about

applicability, I imagine the Planning Director would use several different resources in making his determination, the Fletcher study being maybe one (1) of them but others as well.

Mr. Rapozo: I guess I would feel more comfortable if those were listed. I guess that is what I am saying.

Ms. Yukimura: They are actually listed. They are saying proximity to shoreline, properties between the shoreline and history of coastal hazards in the area. Any more questions on applicability because we should not move forward if not. So let us go to that shoreline setback. Oh, I am sorry. Okay go ahead, Tim. Councilmember Bynum.

Chair Bynum: I just want to thank Ruby. I do not know if we want to go back and look about the credibility of the shoreline study because that discussion happened years ago and as you said it is statically significant and a valid tool. I am more interested, as Mel, this is a watershed decision about applicability and I just want to confirm after all of this discussion that any discretionary decision about applicability, any, is appealable by a wide range of interested parties. Is that correct?

Ms. Diamond: That only means that what the Planning Commission decides follows what was put into the Ordinance and so if the Ordinance says everybody is exempt and they are not applicable then when Planning Commission makes that decision there is nothing to appeal.

Chair Bynum: I certainly do not see that in the Ordinance. It says everybody is exempt.

Ms. Diamond: The applicability as it is written right now is exempting six hundred sixty-seven (667) properties from the Shoreline Ordinance that we know of.

Chair Bynum: And we are at the beginning of this dialogue. I am just trying to identify the...I assume the twenty feet (20') additional, which is news to me today and I wrote it down big, and circled it and said this is very significant. There is no disagreement about that prevision in the law.

Ms. Diamond: No, but it is not for those that it is not applicable to.

Chair Bynum: I understand. Thank you very much.

Ms. Yukimura: So, Caren will be submitting proposed language.

Ms. Diamond: I want to make one (1) clarification. The applicability in "B" was written originally to address those properties that were

really far away from the shoreline. The three hundred fifty feet (350'), four hundred feet (400'), five hundred feet (500') ones, that the impact was not going to be on any coastal area. That is where that discretion was given to the Planning Director. Originally that discretion that was put in there was envisioned to be those that take care of the properties that are far away and have no impact as opposed to the bright line exemptions that are put in there now.

Ms. Yukimura: Okay, Councilmember Bynum has a question.

Chair Bynum: I did not mean to go there so much today but in the past I remember me supporting amendments that said, and I remember Anahola Beach Park, we have an existing shower, the law says we have to put an Americans with Disability Act (ADA) access to it, right? You know we know it is going to be in the shoreline setback, are we going to require the County to do a shoreline? I supported that discretion for the County for those circumstances. I think this provision would supplant that and be more comprehensive and address not just County but any of those types of activities. I will be looking forward to the style or decision on which way to go with this. Okay, thank you.

Ms. Yukimura: Max, did you have anything to say?

MAX GRAHAM: I am happy to respond to questions but I think we have had a clear discussion. The subsection 1 is called the bright line exception because it is real clear that it only applies to properties that are at a certain elevation above sea level behind a rocky shoreline which is a defined term and not within any tsunami flood zone. That is very clear and that seems to be a reasonable exception. The second one is a little bit, obviously more goes to the Planning Director's discretion and the idea was to balance the need to be able for the Planning Department to be able to respond to special circumstances without being bound in by the specifics of the Ordinance. As a Council when you adopt an Ordinance of course you want the Ordinance to be as clear as possible but in some cases you want to give discretion and that is what that subsection does. And then as a further balance, though, we have provided a very user friendly appeal process. So everything gets put on the website, anyone who wants to be aware just gets into the website and anyone who has a concern can file what I hope will be a very simple appeal form and bring it to the Planning Commission. So that is the protection against the possible abuse of discretion.

Ms. Yukimura: Okay, thank you. Let us move on now to the heart of the Bill and existing law which is the shoreline setback determination and that starts on page 8, midway. Ian do you or Ruby or together, both want to give us the overview of it?

Mr. Jung: I think Ruby did a concise analysis on how these two (2) calculations work together so I will let her explain it. That is the handout that was given.

Ms. Yukimura: You have a handout and are we able to put that on the screen?

Ms. Pap: I did a short PowerPoint that is less wordy than the handout so we can refer to the handout at the same time.

Ms. Yukimura: Do you have a copy of the PowerPoint for the Councilmembers?

Ms. Pap: I do not. I can make one available. I do not currently. I was not aware of that rule.

Ms. Yukimura: I remiss in not making it clear but okay why do you not present your PowerPoint and then we will get copies for the Councilmembers.

Ms. Pap: I am mainly going to be referring to this handout. The section on shoreline setback determination again is 8-27.3. This just basically shows a picture of setback from the certified shoreline. The first step is the erosion formula. The way the Bill is set out, and Ian maybe you can chime in if I miss something, but the first task is to go through the erosion formula for a lot that is applicable. That formula attempts to estimate what we call the erosion zone which is here. This is from the *Hawai'i Coastal Hazard Mitigation Guidebook*. Erosions are caused by many factors, hurricanes, tsunamis, sea level rise, lack of sand in the budget, storm waves, etc. The setback formula would be forty feet plus seventy, which refers to years, times the annual coastal erosion rate and then adding twenty (40' + 70 yrs. x annual coastal erosion rate + 20). I am going to explain each of those right now. So the seventy (70) years was based on the average life of a wood framed coastal structure, which was based on an engineering report from 1978, which is the latest that is referenced in the *Hawai'i Coastal Hazard Mitigation Guidebook*. The coastal erosion rate is based on the long term annual rate of coastal erosion and that is this Fletcher study that we have been referring to here. I apologize that is not very large but the red bars indicate the erosion rates that were calculated. Transects were separated along the coastline, separated by about twenty (20) meters and aerial photographs were analyzed back to 1926, approximately. This is not large enough and I can bring one another time if you want an explanation but the shorelines were mapped here and then they did a mathematical model to calculate the erosion rates.

Ms. Yukimura: The red is...

Ms. Pap: The red is erosion and the blue is accretion, which means not eroding or growing. This is just an example from Anahola. You take the seventy (70) years and multiply it by the coastal erosion rate and then you add forty feet (40') and that forty feet (40') has been around for quite some time, it is in the original Bill Ordinance as well. It came from some study done with the *Hawai'i Coastal Hazard Mitigation Guidebook*. It consists of a design buffer of twenty feet (20'), which is to account for the situation where when a structure is

within twenty feet (20') from the shoreline, it is considered to be an emergency situation often when they are asking for seawalls or revetments in the like and the other twenty feet (20') is to account for those more short term storm erosion events, so the north shore of Oahu this year. You add those two (2) together and you get this forty foot (40') additional setback. The additional twenty feet (20') would account for uncertainty related to future hazard risks to help accelerated sea level rise. This mapping effort, which is a really great first step for estimating erosion rates is based on historical data. We know that sea levels are rising currently and will be accelerating in the future. In the mean time as we get a handle on getting some exact data that twenty feet (20') accounts for that uncertainty as well as other uncertainties in the data. So that is the erosion formula and this just shows basically compares to why it is so important to have an erosion rate setback. This is a graphic from Oahu where we have a sufficient setback on the left of one hundred thirty feet (130') based on erosion rates and then we have the historical, sort of forty foot (40') minimum which only really allows for forty (40) years of protection, which as we know structures last anywhere between seventy to one hundred (70 – 100) years.

Ms. Yukimura: And that is if the sea is not rising.

Ms. Pap: On the left, you mean?

Ms. Yukimura: Well both cases.

Mr. Rapozo: So that is a foot a year?

Ms. Pap: Right, but this one here actually has, on the left actually has the additional forty feet (40') feet in buffers on it.

Ms. Yukimura: ...protection, yes, of course.

Ms. Pap: So then we have, if you move in, the first test is to do the...calculate the erosion formula. The second is to look at your average lot depth and calculate a setback from that. The average lot depth does not add to the erosion formula. You take the greater of the two (2) and that is an important distinction in the Bill. But what the average lot depth does is it balances this risk of uncertainty from erosion, wave inundation and flooding so we have all these other hazard factors here besides erosion with property rights of the owner. It is well suited for shorelines where we have that short term, seasonal episodic erosion, for example Wailua or places that are deemed to be accreting now so like Hanalei Bay here in this example. Where the long term, as Councilmember Rapozo suggested the long term rate does not always get at these short term events that may impact our shoreline situations. So by calculating another setback based on average lot depth it is another safety factor that allow you to move the structure back further if the lot size allows for that. It grows with lot depth. It accounts for uncertainty and erosion, wave inundation and flooding and also for future sea level rise. It considers lot size with a setback so it will be relaxed for small lots but increases for larger lots so there is ample space to prevent hugging the volatile

coastal hazard zone. The setback would be, sorry, I skipped over that, you take the average lot depth and subtract one hundred and divide by two and add forty feet (average lot depth – 100 ÷ 2 + 40'). To just illustrate the Hanalei Bay example just so...if you just had the erosion rate based setback, note Hanalei Bay here is mostly accreting based on the long term average rate but there may be some short term seasonal events that may occur and with the erosion rate formula if you were just to do the forty feet plus seventy feet times the annual erosion rate (40' + 70 yrs. x annual coastal erosion). So the annual erosion rate in that case if it is accrediting would be zero (0) so you would end up with a sixty foot (60') setback because you would go zero times seventy is zero plus forty plus twenty (0 x 70 = 0 +40 +20). But with a lot depth, if the lot depth is large enough which you cannot really see but it would allow the setback to move further back if it is larger than the sixty foot (60'), so you take the greater of the two (2) formulas.

Ms. Yukimura: The coastal erosion rate formula...we are applying that to small lots or lots under one hundred forty foot (140') average depth. Above the one hundred forty foot (140') average depth, we are requiring bigger setbacks.

Ms. Pap: Well it would require you to take both calculations and then take the greater of the two (2).

Ms. Yukimura: Right, that is true.

Ms. Pap: Many of the cases it would be the erosion rate based setback but if you are in a case where you have a very variable shoreline, let us say you just have point two percent (.2%)...point two foot (.2') of erosion per year based on the long term average but in the mean time you have had a lot of erosion, maybe you have had a couple of storms, that is really what is going to matter when it comes to siting your structures is accounting for that variability so that adds that safety factor by having the lot depth as sort of a minimum. I hope that helps.

Mr. Jung: So I suggest that the Council takes a look on page 10. There is a table that attempts to illustrate this. It sounds very complex but in trying to implement and potentially apply this you are going to have to have two (2) silos. 1) you are going to have areas where the erosion rate study is applied; and 2) in areas where it does not apply. If it is applied, the erosion rate study applies then you are going to go through the analysis of less than one hundred forty feet (-140') or one hundred forty feet to two hundred twenty feet (140' – 220') and greater than two hundred and twenty feet (220') would be on a separate scenario. It lumps them up into two (2) silos and then each of those silos are broken down further just so there is clarification on how the calculations will apply. At the end of the day what this provision is doing is showing what the calculation will be so there is no discretion here. The calculation is what it is whether whichever one is greater will apply.

Ms. Yukimura: Anything more, Ruby?

Ms. Pap: Not at this time but I am available for questions.

Ms. Yukimura: Yes, why do we not go into questions now? Ruby, the chart is basically the way of setting shoreline determination. We will go into a few of the wrinkles later.

Mr. Rapozo: I have a question.

Ms. Yukimura: Sure.

Mr. Rapozo: The greater than two hundred twenty feet (220') it is so...the minimum of one hundred feet (100') that is...they do not have...it is not average lot depth.

Mr. Jung: Because the depth of the property is so significant they would not need to go do the average lot depth calculation.

Ms. Pap: If you look at the bottom of the sheet it explains that for very large lots the setback is actually capped at one hundred feet (100') for the average lot depth setback but it does not mean that the erosion rate formula would not result in a larger setback and in that case you would have to take the greater of the two (2) but it is a fairness property rights issue.

Mr. Rapozo: So if there...

Ms. Yukimura: If there is very high erosion than it could very well go over the one hundred foot (100') but if there is not then one hundred feet (100') seems safe.

Mr. Jung: I think just for a historical point of view the Planning Department initially wanted to go with just the coastal erosion rate calculation but Sea Grant was pretty adamant about keeping in the average lot depth calculation just to accommodate for a sense of property rights when you get to these larger lots.

Ms. Yukimura: But it is also for coastal safety because where you can setback because you are so large, you know, you are requiring them to setback. So it is actually helping both. Questions? Councilmember Chock.

Mr. Chock: Yes, just a question. Do we know how many small lots, about one hundred feet (100') or less we have? Right now it is capped at forty feet (40'). Just a question...no?

Ms. Pap: I could find out for you if you like.

Ms. Yukimura: So, Ruby, between now and two (2) weeks you can provide that information.

Mr. Jung: And I think that is probably...unless there is...if there are no more questions a perfect segway into the next section when we try to deal with subdivisions because one of the issues, a reality of the situations is that a lot of these lots were created when there were no shoreline regulations or when there were limited shoreline regulations. To accommodate for situations where you are going to design and create lots through the subdivision process you are going to want this shoreline setback process to be applied to it. When you design your subdivisions you want to accommodate for a larger area to create a buildable lot or have a buildable lot without having any potential anticipated impacts from coastal hazards or erosion. So if you look at the next section...Caren wanted to make a comment.

Ms. Yukimura: Before we move on you want to talk about the basic formula? Go ahead, Caren.

Ms. Diamond: Thank you. There is a...I think the example before you is a good example because earlier Councilmember Rapozo was talking about the studies and basically there was three (3) and ten (10) points done for each shoreline and then they were compared over time. Whatever was available is what was used and the months that they were done and were not consistent or anything like that and so when we look at Hanalei Bay and we see that it is mostly accreting and those of us who know Hanalei Bay know that Hanalei Bay is not really accreting. The only spot that really on the right there where it is showing that it is not accreting that is where it is actually accreting and the State did take that land. So we are supporting the depth based chart that is in here because that does get rid of that uncertainty that creates this kind of thing but I also...the one (1) problem we have is that when you have one hundred forty foot (140') lot and you are only having this strict erosion lot there is where we are going into the variance section and so I want to point out there are two (2) components along with this that you have to think about and one (1) is the minimum buildable footprint and what number that is for the house and the other is the variance section. If the lot does not accommodate that erosion based formula and that is larger than the depth base formula then they will come for a variance and that section goes down to thirty feet (30') and so in that aggressive setback regime we could be causing was smaller lots to be having smaller setbacks. Those are all things to consider as we move through this. Thank you.

Ms. Yukimura: So we would be taking up Caren's concerns when we address the variance part. But she is right that there are issues that come out in the application of this formula. But these formulas take into account that average lot depth which is the more protective, I think stance. Ian, do you want to then move on to the issue of subdivision? That is "e", "f" and "g" on page 11.

Mr. Jung: Okay, right, "e", "f" and "g". What is being eliminated in "e" is the zoning amendment general and development plan amendment but what is remaining is the subdivision. The reason zoning general plan amendment and development plan amendment are being eliminated from there, that is ultimately going to come down to this body in terms of quasi

legislative action where you are going to look at rezoning certain areas. From a regulatory standpoint, the Planning Commission only deals with subdivision so it is proper to address the issues of coastal hazards and whether or not a hazard assessment is required in the actual Zoning Amendment (ZA) section of the Comprehensive Zoning Ordinance (CZO) rather than this area because you are making a distinction between a legislative act and then a quasi judicial type act. That is just for that clarification point. Then when you move on to "f', you get to the issue of subdivision and what the future planning perspective here is you want to deal with lots that are abutting the shoreline and create...this is "f' and "g", create the opportunity for lots to be created larger than what preexisted under our zoning code. There are a lot of small lots created along the shoreline area but now if this amendment is floated and passed what will happen is if you are going to come through and do a subdivision, your shoreline lots are going to have to be configured to maximize what we put here as a building footprint of five thousand (5,000) square feet buildable area. So, you have to be able to accommodate a footprint of five thousand feet (5,000') based on the calculation that is in "f' of seventy time the annual coastal erosion rate. (70 x annual coastal erosion rate) as measured by the certified shoreline plus with that additional twenty foot (20') safety buffer for episodic coastal events and sea level rise and other hazards. You are going to basically default back to the erosion based setback calculation if you are going to come in for a subdivision on seaward lots. So your lots can be large enough to accommodate for a five thousand (5,000) square foot buildable area.

Ms. Yukimura: We are applying the shoreline setback, the determination of a shoreline setback area, we are requiring that when there is an application for a subdivision basically and we are requiring that the lots be designed so that we will not have trouble citing housed on the lots, basically. Caren.

Ms. Diamond: I think your language...

Ms. Yukimura: Yes, we did a quick change on...you have the buildable footprint?

Ms. Diamond: Yes, the buildable footprint is the size of the house. That is what "footprint" is. Footprint refers to the size of the house.

Ms. Yukimura: It actually includes garage and everything. We have it very...

Mr. Jung: Yes, there is a definition available.

Ms. Diamond: So you want the footprint of the houses to be five thousand (5,000) square foot?

Mr. Jung: No.

Ms. Yukimura: We want, at least a five thousand (5,000) square foot area to be set aside for...now, Mike, just to explain. When we talked about it on Friday, we were talking about buildable area. When we started to draft this amendment, we thought what is the definition of buildable area? There is no definition of that. So we resorted to a place where we have a definition, which is buildable footprint and when you looked at the definition of that, it is in the building code. We are trying to stay consistent across all these different approval processes. Footprint seemed to be better because it does include garages, porches, things like that, however, if we have some concerns, and there may be some valid concerns, we may have to look at that in the next two (2) weeks. Go ahead.

Chair Bynum: Quick question about the footprint. Is that consistent with the hard surfacing? There is usually a fifty percent (50%) lot coverage or something. Is it the same thing?

Mr. Jung: No it is not. Land coverage/lot coverage is often referred to as different from building footprint because the definition of building footprint is specific to this particular Ordinance and had already been predefined to this Ordinance.

Chair Bynum: So a building footprint, most of that would be hard surfaces but it would include raised decks that maybe...

Mr. Jung: It would include lanais and porches.

Chair Bynum: Okay, thank you.

Mr. Jung: And if you look at the actual Bill No. 2461 it is also defined in there.

Mr. Bynum: Right, right, right. It was already defined, perfect.

Ms. Yukimura: It does not mean the square footage of a house because you can go up to a two (2) story building. You can actually double, well, depending on what your actual house area is, just know that you can also go to another level. Councilmember Rapozo.

Mr. Rapozo: Thank you. You are saying the subdivision would not happen if they did not draw the line at a location where it could accommodate a five thousand (5,000) square foot footprint?

Ms. Yukimura: Outside of the setback.

Mr. Rapozo: Using the erosion rate?

Mr. Jung: Yes, now through a subdivision process your shoreline subdividable lots are going to have to be designed to accommodate for an

area behind where that setback line is going to be to have at least five thousand (5,000) buildable footprint area.

Mr. Rapozo: Does that mean that the applicant for a subdivision now would have to go get a shoreline certification?

Mr. Jung: Well they now have to anyway.

Mr. Rapozo: Oh, they have to get one anyway.

Mr. Jung: Yes. This is just one (1) extra step to say okay, to accommodate for future planning, for future potential erosion then you are going to have to create this buildable area in the back of the lot.

Mr. Rapozo: And even if...the house could be as big as they want. It is just that they have to have the lot...they cannot start building from that...

Ms. Yukimura: At least.

Mr. Jung: Correct.

Mr. Rapozo: Thank you.

Ms. Yukimura: It is a minimum. They can have larger and it is only for the shoreline lots but it is just to make sure that there is enough...the owner of the lot has enough room to build in beyond the shoreline setback area.

Mr. Rapozo: To manipulate the Ordinance they could get a smaller setback. In other words if they draw the line...the owner could own the lot, the big lot, and when he subdivides the lot so that he would be subject to the smaller setback utilizing a short lot and then build, but he would still maintain ownership of the entire big lot. To enjoy a much smaller setback, in other words, draw the line and cut the lot short so he would have the shorter lot. In this case, he would not be able to. He would have to build with the buildable footprint of five thousand (5,000) feet. So that is a good thing.

Ms. Yukimura: He is not going into a variance situation where he is asking to give him the minimum setback. Go ahead, Mike.

Mr. Dahilig: I just wanted to comment on Councilmember Rapozo's analysis. That is exactly the reason why we wanted this provision in there because there could be the possibility of people trying to gerrymander lots to then get to a variance standpoint and then build as they can to the shoreline. Because after a subdivision you still need a zoning permit and so his point is exactly on point in terms of why you would want this provision in there.

Ms. Yukimura: Any other questions on this? If not, can we go back to this non-abutting lots so we can explain to them the problem of getting a certified shoreline and why we have put in this language. That is subsection "D" on page 10 on the bottom.

Mr. Jung: In the applicability section it still applies to abutting or non-abutting lots but what has been raised to our attention is there could be the situation where for non abutting lots the landowner who fronts the person who is applying for the permit will not give the authority to Department of Land and Natural Resources (DLNR) to go onto the property to certify the shoreline. In these types of situations where it is virtually impossible for the applicant to get authorization to do the certified shoreline then the Planning Director will have the ability to basically go and if there are coastal hazards or erosions aspects that exist apply to the zoning permit that go greater than the normal setback regulations we already have. Like a side yard setback is five feet (5'), the Director could potentially go up and put a condition because of coastal mitigation up to twenty feet (20'). That accommodates for the situation where a landowner will not allow someone to come in and do a certified shoreline and this is a real situation because if you have a situation where a property owner does a certified shoreline and they note it higher than what the property owner might want that land now becomes a part of what is called the Coastal Beach Transit Corridor. It becomes, under the public trust of the State and the State now alleges that they could potentially say it is their land but at the end of the day from where the shoreline is to the ocean, that is the beach access corridor as defined under Hawai'i Revised Statutes (HRS) 115. I would encourage you guys to go and read HRS 115 because that sort of outlines how it all works. Landowners who are not abutting may be held up by someone whose property is abutting because they may not want to have a permit application come through their problem. It might impact their particular piece of property.

Ms. Yukimura: Did you understand that? Councilmember Chock.

Mr. Chock: How did we determine up to twenty feet (20')?

Mr. Jung: The Planning Director is going to have to analyze the situation to see how far back is the non abutting property, what the coastal erosion rate is there, because you are not going to use the average lot depth scale anymore because the lot dept it sort of relevant at that point because it is not abutting but you can look at the coastal erosion rates are doing and try to apply that standard to see where the shoreline may be. It is a difficult situation and I do not know if Max, do you want to try to take a better crack at it because I think you help raise that issue.

Ms. Yukimura: There are not that many situations, right, of non-abutting but were there are we need to be able to address them. Often where there is a road, like in Hā'ena, you know there is the ocean and there is the beach,

the road and then a house. The ocean goes over the road at times so that is one and then there is another where there is a lot in between, it may be vacant or it might have a house on it but those are the situations. Max did you want to...

Mr. Graham: We are trying to account for the situation where you have a strip of land, another lot that is between the shoreline, and the lot in question. And so we have situations where we have road ways County or State roads and then sometimes I know of situations, I think westside and Hā'ena side where we have strips of privately owned lands that are unbuildable but are actually fee simple strips and then you have the road and then you can have a lot behind the road and it may be easily within one hundred fifty feet (150') of where the shoreline would be so in determining where homes should be built on the back lot we want to give the Planning Director discretion to at least establish some kind of a setback.

Ms. Yukimura: Questions? If not, I would like to recommend that we go to the variance section, which Caren had some concerns about. If there are landowners...well you go ahead and explain variance, Ian and we are looking at...starting from page 20.

Mr. Jung: Maybe it would be best if I put that slide back up then we can point to it. Thank you, Aida. Just like with any other zoning code you need an out because there are always special circumstances where the parameters of development is not going to fit within the certain development standards that are applied through code. It is common practice across all of the United States to deal with having what we refer to as variance protocols and how to apply for a variance and what type of standards are applied for variances and the distinction between this code section and our standard code is the variance section in this particular article of the CZO is real specific in terms of what you can and cannot do. Basically, the variance section is an out clause depending on special circumstances. When you have a lot and a no build zone and say the lot is a shallow lot where you are going to have a no build zone line here, a setback line here but you have only forty feet (40') to build, forty foot (40') depth to build and they need to protrude in another twenty feet (20') to get an average size house, let us say. Then you are going to have to go through the variance protocol and you go through step on as doing the erosion base setback and the average lot depth category or average depth log calculation. If you do not meet that line, say it is here then the next step is to look at how to get below that line and there are specific protocols set for on page 21 dealing with; 1) construction of a new dwelling unit and; 2) rebuilding of an existing dwelling unit.

So the first step in how to analyze this is looking subparagraph 11 on page 21. You look to see if in a case where the minimum buildable footprint does not allow for a setback. You are going to look that definition of minimum buildable setback or minimum buildable area, footprint, sorry. Thank you, Caren. If you cannot achieve fifteen hundred (1,500) square feet here you can start going down. The next step in going down, after you do not meet fifteen hundred (1,500) square feet is trying to deal with looking at the side yard and rear setbacks. Every lot has a front, side and a rear setback. What you have to do next is look at shrinking down

the front yard setback and the side yard setbacks. If you still cannot achieve that fifteen hundred (1,500) square foot minimum buildable area, then you have to move into shrinking. So you are looking at "C" now, 11-C. Then you look at shrinking the minimum buildable footprint area below fifteen hundred (1,500) square feet. If you still cannot do that, in operating out of 11-D, then you have to get a qualified consultant to certify that the property is not subject to undue risk and high wave action and then, and only at that point could you go up to forty feet (40'), forty foot (40') setback line. However, forty feet (40') is only going to be for non-rocky or low lying ledges subject to wave over toping regardless of material. This was Sea Grant's recommended language to try and accommodate for potential erodible areas. If you look at little "i" now, you can go down, potentially to thirty feet (30') if you do not make that fifteen hundred (1,500) square foot minimum buildable footprint. Down to thirty feet (30') only and only if you are on a rocky shoreline and as was previously defined as non-erodible areas, so you are going to have to have this qualified consultant to basically say that you are not subject to undue risk or hazards if you go down to thirty feet (30') on a rocky shoreline. So it is a tiered process in terms of how you get there. Step 1) You look at what the minimum buildable footprint will be. Step 2) If you cannot achieve that you then go to reducing side and front yard setbacks, which are the normal setbacks that we have in the CZO. Step 3) Is that you reduce the minimum available footprint to try and accommodate within that area where you already reduced the side and front yard setbacks. If you do not get there, then and only then can you go down to forty feet (40') and potentially thirty feet (30') on rocky shorelines.

Ms. Yukimura: Thank you. I want to also add that one thing about the variance process is, as I understand it, correct me if I am wrong the Planning Department requires that the applicant say that they will not sue the County if the waves start encroaching on their house nor will they ask for hardening of the shoreline which could cause erosion down neighboring neighbors. So people are clear at the outset, before they start building if they get a variance they have to do all of these things so they cannot come in screaming and yelling that their house is falling in the water and that the government has to do something to help them.

Mr. Jung: I think that is important to know and I appreciate you bringing that up. One of the other factors I forgot to mention to you guys is that the permitting process for this is a separate and distinct permitting process. You are going to actually apply for a variance which then triggers a Planning Commission review and as a part of that Planning Commission review, if you are going to go into that, what we call that setback area, the no build zone, if you are going to go in there, again it triggers a 343 document which is that you are going to have to do a environmental assessment, potentially an environmental impact assessment. There are quite an array of challenge points through that process and also the ability for intervention at the Planning Commission level because there will be, at this point a Planning Commission permit with a variance and class 4 zoning permit process.

Ms. Yukimura: Okay. Questions about the variance process?

Mr. Rapozo: I have a question and I am not sure if it is variance related but it could be. In the event that a structure is built that is not in compliance with this statue or any other one for that matter, what is the likelihood in putting in a prohibition to any after the fact permits and then in fact the structure is to be removed or relocated?

Ms. Yukimura: That is a good question.

Mr. Jung: That is an excellent question.

Mr. Rapozo: It is something that...

Mr. Jung: And it is a reality. That is certainly a thing but I think it all depends on if the applicant applies for it then the application has to be considered and you have to look at all the issues that it raises. If you guys put a prohibition in there about a variance then the structure will have to be removed.

Mr. Rapozo: Exactly. That is what I want. Because there is no sense to have this and then they build, then they come back and say, "What do I have to pay?" I will pay my after the fact fee and I get the smaller setback. I want that in this Bill that if in fact it is not in compliance that they will be no...

Mr. Jung: I will take a look and see if I can find if any scenarios like that have happened before and see how...

Mr. Rapozo: I think you know where I am going with this. It is really...the first thing is to try to get out on an applicability option and then build where you want then just deal with it later with a check to the Planning Department or County of Kaua'i. I do not want that. If in fact they violate and they build inside of the setback then either they cut that property, that house, that structure and remove that area that is encroaching or move...that needs to be a part of it otherwise it is quite meaningless.

Ms. Yukimura: It makes sense to just say if you do not...

Mr. Rapozo: If we want to accomplish what we are trying to accomplish then we need to be serious about it. It is just that simple.

Ms. Yukimura: And it would save a lot of trouble of having them apply and then you say no too. You know what I mean?

Mr. Jung: Sure.

Ms. Yukimura: It is just clear. You go through the right process or...Mike, do you want to say something? Can you pass him the mic?

Mr. Dahilig: I think we could concur with some kind of amendment that addresses that because if they are coming in for an after the fact

permit, certainly that could be a precondition to the variance. We already have other preconditions that are in there and so a policy standpoint and from just an implementation standpoint I think it makes sense.

Ms. Yukimura: Okay, very good. Ian, will you work on an amendment?

Mr. Jung: Yes.

Ms. Yukimura: Okay, good. Anything else on variance? Councilmember Chock.

Mr. Chock: I just wanted to hear from Caren or Max on that in addition to...I know this was an area of question and need so if there is more, I would like to hear it upfront.

Ms. Yukimura: Very good. Caren.

Ms. Diamond: Thank you. The variance section is one that I have trouble with and if you look at Hā'ena, using that as an example. A lot of our lots fall within one hundred sixty to one hundred and fifty foot (160' – 150") size and you can see that mostly there is about a foot (1') of erosion a year and so predominately those lots would fall into erosion based setbacks and then they would have large setbacks and would come in for a variance after that. Typically a setback that would be one hundred thirty feet (130') on the erosion based could come in and get a thirty foot (30') or forty foot (40") variance: If you look at the lot depth based chart in here I am wondering if we cannot write some kind of provision so that gets enacted as a second tier so that before you would go to the variance section you would look at that chart and then if you could site that based on that then you would not have to go through the whole Planning Commission part for a variance and there would be some middle tier before you started allowing people to go down to thirty foot (30') and forty foot (40'). One of the other problems with the variance is...well there are two (2) different parts, there is the rebuilding and there are new structures. In the rebuilding structure part we are talking about rebuilding can happen after a disaster and so you are say that the houses all get wiped out and then you allow them to be rebuilt twenty feet (20') from shoreline and that is what you are saying.

Ms. Yukimura: Not twenty feet (20").

Ms. Diamond: Or thirty feet (30'), whatever, because I have not read it yet. If it is thirty feet (30') today. Twenty feet (20') is the part where you are needing seawalls, needing to protect that is where the State recognizes there is an imminent hazard and so that twenty foot (20') part is known as the imminent hazard part and so you are allowing houses to be relocated, rebuilt after a disaster in the hazard zone again. I ask you to look at that part again and look at how to make the section so that less houses fall into the variance section. Thank you.

Ms. Yukimura: Okay. Councilmember Kagawa, you had a question?

Mr. Kagawa: I think I have more like general type questions. I am looking at the old ordinance and it had a progression, one hundred feet (100') or less was forty (40), one hundred one to one hundred twenty feet (101'-120') was fifty (50) and so for every twenty feet (20') we had a change. You have to move ten feet (10') back, ten feet (10') back. In this one the cut offs are greater. It is less than one hundred forty feet (140'), it is forty plus twenty (40 + 20) or what have you and then one hundred forty to two hundred twenty feet (140'–220') so the difference is not...it is no longer twenty (20), it is area eighty feet (80'), you know you get that same treatment. I am kind of wondering is the old way better or fairer because it accounts for...sort of like income tax, if you make over one hundred fifty thousand dollars ($150,000) combined you are in a totally new bracket. What if you make one hundred forty-five thousand dollars ($145,000) why are you in the lower bracket but it is just trying to find the fairest way. I do not know if you have a response because this is pretty much new, right. On Kaua'i, we are trying to improve our laws and we are not really following any other counties with these categories?

Ms. Pap: Good question. Actually, the original, you are looking at the original lot depth formula, which is in the original Bill or original Ordinance 887.

Mr. Kagawa: Yes, exactly.

Ms. Pap: And the Bill is actually on page 10 but it is proposed and to be removed.

Mr. Kagawa: Yes, I am looking those.

Ms. Pap: This was the original lot depth formula that was actually conceived in Maui. When they did the first drawing setback Bill there and what has been found since then is this is actually considered a little more unfair because you have large jumps in the setback. It is not a smooth transition in the setback as you move back, so like if you go from one hundred feet (100') to one hundred one feet (101') you have a ten foot (10') difference in the setback. There was sort of jumps in the setback.

Mr. Kagawa: Yes, there is a jump for that one foot (1').

Ms. Pap: So the new formula is an attempt to smooth out the transition so that it is, and they have actually made it into a table as well so it is easier to read rather than to just reading the language.

Mr. Kagawa: I understand your answer. I do not have any annual coastal erosion rates to play with. I am just trying to think of how it compares with our previous Ordinance but I just did some kind of rough calculation

in my head and I am looking that maybe if we compare is my calculations correct? Is every lot pretty much going back about twenty to thirty feet (20'-30') on average from the prior?

Ms. Pap: Going further *mauka*?

Mr. Kagawa: Yes, is it going to have to setback an additional twenty feet (20') or are the jumps not that big?

Mr. Jung: From the original Ordinance?

Mr. Kagawa: From the original.

Mr. Jung: Yes.

Mr. Kagawa: From the one that we are currently abiding by.

Mr. Jung: Not from the lot depth category but you are going to have to add that additional twenty feet (20') now.

Mr. Kagawa: Yes, so you are going to add twenty feet (20') to everybody right?

Ms. Pap: Yes, that is the main difference.

Mr. Kagawa: Just about twenty feet (20') to everybody but it could be more if that area suffers or has a higher erosion rate?

Ms. Pap: Not anymore than what is required now because currently they do use the same erosion rates that are still in effect.

Mr. Kagawa: Okay.

Ms. Pap: And the lot depth table in terms of the actual setback line, I believe is comparable to both tables. It was just sort of designed to have more smooth transitions between the lot sizes.

Mr. Kagawa: I just appreciate all of your work. I see what is happening on the North Shore with the big surf and it is really for the protection of the homeowners that we really want to come up with something that is reasonable. That saves them and prevents us from being sued, also for not having thought about it but one of the things that concerns me and what happened with the north shore are those walls that are created that in hindsight maybe should have been built another way. Instead of being building twelve foot (12') footings and also when the erosion starts it can create even more erosion elsewhere. Well, that is one of the theories.

Ms. Yukimura: It actually happens.

Mr. Kagawa: Yes, so how is a wall going to be affected by these setbacks? A hollow tile wall that you want to build fronting your property, is that going to be allowed or disallowed?

Mr. Jung: Well, if you apply for a variance you will not be able to harden your shoreline. In any County jurisdiction the problem is the Office of Coastal and Conservation Lands are primarily the ones that deal with seawalls because it is going to be in what we call below the shoreline area into the beach transit corridor, right, before where the waterline starts. So that is a separate permitting process through State DLNR in terms of how they deal with seawalls.

Mr. Kagawa: Alright.

Ms. Yukimura: But we do say that, in terms of variances, if you get a variance you cannot come in because we are going below the setback line. You cannot come in to ask to harden the wall later on.

Mr. Kagawa: If I can just have a last follow-up? I just had this come up in my head...I just thought there had to be acceptable means of just not totally barricading your property with cement but just wood posts not requiring large footings or something that allows the property owner to protect his property and allows us to say okay that is acceptable for you to surround your property but with something that is not considered hardening. I do not know if Planning can at some point consider those things as we head forward.

Ms. Yukimura: Ruby.

Ms. Pap: Just a quick comment and then I will pass it on. One of the things, I think you are talking about soft approaches to hazard mitigation as opposed to hard, hard versus soft and it is a difficult question but a couple of the techniques that are out there for more environmentally friendly ways of protecting property are perhaps doing dune restoration. So restoring the dune in front of the home which allows the beach to continually replenish and perhaps beach nourishment. That really is case by case specific on what the situation is on a lot but in the current Bill does allow for those types of soft approaches to be considered. I am not sure about the wooden structure that you are referring to or what have you but there are...this is a subject under continual discussion at the State level, County level...

Mr. Kagawa: State issue...alright.

Ms. Pap: It is both but this Bill does attempt to balance all of those issues and give due process to the conversation.

Mr. Kagawa: Thank you.

Ms. Yukimura: Before I go to Mike, I just wanted to note that it is lunch time so I am going to have Mike finish up with a commentary and we will recess for lunch and come back on the last few sections and I think we will be done.

Mr. Dahilig: Just to address your question, Councilmember Kagawa. Some of it is within our ability to regulate, some of it is as Ruby and Ian did mention, outside of our jurisdiction to regulate and so the balancing element of how to preserve the beach transit corridor with the protection of property is within the jurisdiction of DLNR and the Board there. That is the first step for us to then come in and make additional revisions.

Mr. Rapozo: Councilmember, can I ask one question? I do not expect an answer now but we can get it when we get back because it is still on this subject.

Ms. Yukimura: Yes, sure.

Mr. Rapozo: Ian, I guess this is for you. On the issue of rebuilding an existing structure that is wiped out because of an event and the County's, I guess, we allow them to rebuild. That it currently reads? Anyway, my question is, and we can do this when we get back, how do we protect the County in the event that we allow someone to rebuild on the current footprint because it was destroyed? And we let them build again and it gets destroyed again.

Mr. Jung: There is a quick answer to that because we have on schedule, subparagraph "f" on page 24. There is that limitation on that shoreline hardening and then "g", you have a provision and this sort of stems from that Morgan vs. Planning Commission seawall case that you are basically going to indemnify the County in writing so shall defend, indemnify and hold the County of Kaua'i harmless from all and against any loss of liability claim or demand rising out of damages to said structure.

Mr. Rapozo: And that is legally sufficient?

Mr. Jung: We would enter into the agreement with them and that would be recorded. But this interplays with our non-conforming use and structures element of the other part of the CZO which we can talk about later.

Ms. Yukimura: Let us talk about that after lunch so we will take a lunch break now and...is that okay? Checking with the Chair. So will be back at 1:40 p.m.

There being no objections, the Committee recessed at 12:39 p.m.

The meeting was called back to order at 1:45 p.m., and proceeded as follows:

Ms. Yukimura: When we left off we were finishing the variance section. Actually, before we...no, I want Caren here for it so why do we not talk about the civil fines issue that you were explaining, Ian. There is nothing in or is there in the Bill itself? Go ahead. You explain.

Mr. Jung: One of the other main issues that stands out in Bill No. 2461 is there is some concern that we are removing the civil fine authority and enforcement authority but what we are trying to do there is reconcile this article to the main CZO because there are some subsequent amendments done to the CZO relative to the civil fine authority in terms of increasing the civil fine ability or number. So basically we are eliminating it from this section and then any violation of this article would just default to the civil fine and penalty section of the CZO itself. So you will see in Bill No. 2461 were certain things are bracketed out.

Ms. Yukimura: That is not in the amendment.

Mr. Jung: Not in the floor amendment but someone posed the question.

Ms. Yukimura: Not in the floor amendments, it is in the Bill itself for civil fines authority is removed. Do people have copies of the Bill itself or do you want a copy?

Mr. Rapozo: My question is there language that references back the code penalty section?

Mr. Jung: No because the penalty section applies to all articles of the CZO. This was more specific to this area but now that we have increased dollar amounts in the other portion of the CZO.

Mr. Rapozo: Could it we put in here just so that it is clear? I understand that it says all in the penalty section of the CZO but is can we put down violations of this section?

Mr. Jung: Go to the new article?

Mr. Rapozo: Yes.

Mr. Jung: That is fine but it is not necessary.

Mr. Rapozo: I know but then it is not in dispute.

Mr. Jung: Sure, so we can do a floor amendment to do that.

Ms. Yukimura: Okay, will you work on that too, Ian? Any questions about civil fines? The section in Bill No. 2461, right now we are looking at the amendments to the Bill but in the Bill itself it does bracket out the civil fines

provision that is in the current law but as Ian explained it bracketed out because the section in the CZO of which this is a part applies to all parts of the CZO but at Councilmember Rapozo's request we will just have a line that refers to this but if anyone wants to see the Bill I have it here.

Mr. Rapozo: What was the difference between what is in the current Bill and what is in the penalty section of the CZO?

Ms. Yukimura: I think it was some of the changes you made, Mel because we made changes, did you not?

Mr. Rapozo: Specific to the CZO?

Ms. Yukimura: I think you initiated some changes to the CZO, fine provisions.

Mr. Rapozo: I did, but this one was...I remember we had a separate penalty section for this Bill and I just want to make sure.

Mr. Jung: Basically to harmonize the two code sections, because if you were to have kept the civil fines it was at one thousand dollars ($1,000), mandatory penalty of one thousand dollars ($1,000). Under the new CZO, I think it is up to ten thousand dollars ($10,000). If you look at Ordinance 8935, which is the new, updated CZO it is in section 8-3.5.

Mr. Rapozo: In the current section it says, "that any person who violates any provision of this article shall be subject to the penalties provided for in HRS 205A-32". I would just like to add "and our code section 8-3.5." Then it is very clear.

Mr. Jung: Okay.

Mr. Rapozo: Do not remove also. By removing that article you take out the whole reference to HRS 205A-32.

Mr. Jung: Just so you know, under the enabling act of H.R.S. 205A part 3 there is already a right of action procedure that the County and State could go through to enforce the CZM, independent of the CZO.

Mr. Rapozo: It just clarifies and it does not leave any...

Mr. Jung: And it will not harm it.

Mr. Rapozo: Right.

Ms. Yukimura: Anything else about civil fines? If not, I do not know where Caren is. Is she coming back? Does she have a cell phone on?

Ms. Pap: Here she is.

Ms. Yukimura: Oh, wonderful. Thank you. Caren, we were just talking about you because I want to go to, and it is one (1) of Caren's concerns and I did not want to have a discussion without her. It is about the variance provision to forty feet (40') and thirty feet (30') minimums and that is on page 22 and 23. Page 22 is about a new dwelling unit and page 23 talks about an existing dwelling unit but they are parallel provisions, they say the same thing. I believe Caren has concerns that we are going down to thirty feet (30'). I just wanted to further discuss this. One of the things that was compelling for me was, if you will look at the beginning of "d", 11d or 12b4...at the beginning of it if the foregoing approaches are done to the maximum extent practicable the calculated shoreline setback may be reduced provided that a qualified consultant must certifiy that property is not subject to undue risk from erosion, high wave action or flooding. Then under no circumstances shall the shoreline setback line be less than forty feet (40') for non-rocky shorelines or thirty feet (30') for rocky shorelines. I just want to talk a little bit about the qualified consultant that is very tightly defined in the definitions and...oh! I missed mentioning Chris Conger who was also around the table. Is that the right pronunciation of his name? He is one of those professional consultants. What is his position, Mike?

Mr. Dahilig: He is a Coastal Geologist with Sea Engineering.

Ms. Yukimura: He is a Coastal Geologist who was brought over by David Arakawa and Land Use Research Foundation (LURF) but on the condition that he would be able to give his professional opinions. He just described for us the pretty strict terms under which consultants in his field are held accountable. He said if they were to ignore information about wave action or erosion or past history, their liability insurance would be at stake and without the liability insurance their company could not really do business. My first thought was these professional consultants, they just do whatever they are hired, the people who procure them or hire them want them to do, they just justify the applicants position but I do not think it is that easy. I just wanted to explain that and then the only other thing is that the thirty feet (30') for lots with rocky shorelines, we went over this over and over again in terms of what is a rocky shoreline and that is defined pretty tightly to make sure that if it is at least a high rocky shoreline...it is a highly elevated property the rocky shoreline will not be erodible. That is just additional information that came up during the discussion. Ian, you wanted to point out something vis-a-vis State law.

Mr. Jung: It was on the slide from this morning. We are stuck in a situation where State law HRS 205A basically says that you have a maximum of forty feet (40') with a minimum of twenty feet (20') so the State law itself is recognized the ability to go down to twenty feet (20'). Whether or not that is good or bad from a policy standpoint, until State law changes that number is on the books. If the State is willing to take up that issue in terms of re-evaluating whether or not that is a correct safety bench then at that point we can harmonize our code,

should it get there, to deal with increased buffers other than what the State law already provides.

Ms. Yukimura: I want Ian to finish. Go ahead.

Mr. Jung: That is basically it. If someone were to come in for a variance, which is a very difficult permit to get because you have to go through the first tiered process of reducing your side yard setbacks, reducing the minimum buildable footprint and then incrementally moving down to get to that thirty foot (30') mark. There is still the ability...well we are saying thirty feet (30') not twenty feet (20') so we still have a potential point.

Ms. Yukimura: On rocky shorelines.

Mr. Jung: On rocky shorelines, we still have a potential point to say, "Hey look, it is still not erodible." It is not necessarily safe because they are going to have indemnify the County and provide a unilateral agreement that says we will not harden the shoreline. There are safety marks in place as you go through this pretty extensive permitting process with the variance and doing the EA and all of that stuff. Until State law changes then we can look at moving that up based on what the current State code will say.

Ms. Yukimura: Okay. Thank you. Caren.

Ms. Diamond: Thank you. I wanted to point out that in 2011 the State adopted a new Hawai'i Administrative Rules (HAR). HAR 13-5 has a minimum of forty foot (40') setback and it also uses the table similar to the one that was taken out of our Bill and I do not believe that we need to go down below forty feet (40') for any variance and I also think that we should make it so that it is understandable and it does not automatically go into the variance section because if your erosion based setback does not work then you have automatically go to that variance section. The way it is written right now, even though the house minimum buildable footprint is reduced to fifteen hundred (1,500) square feet we are talking about building a fifteen hundred (1,500) square feet where there is no room to do it and so I would ask you to please consider making it fifteen hundred (1,500) feet or smaller because if when someone buys a small lot they know it is a small lot and the courts, the supreme court in the Brescia case definitely ruled that although someone is entitled to a house, there is no magic size. They do not have to have a huge house and so before you go into the variance, you should reduce the house smaller, smaller, smaller. Otherwise you are putting houses at risk and you are throwing out the whole protection.

Ms. Yukimura: That is part...reducing the minimum building footprint is part of the variance process.

Ms. Diamond: But only to fifteen hundred (1,500) square feet.

Ms. Yukimura: No, no, no, below fifteen hundred (1,500) square feet.

Ms. Diamond: So you would have to redefine minimum buildable footprint as well so that it is consistent.

Ms. Yukimura: No, we are allowing to go below the definition in a variance process. But thank you though.

Mr. Rapozo: I have a question.

Ms. Yukimura: Yes, sure and just so you know HAR is the regulations for conservation land. It is not a State statute.

Mr. Jung: Hawai'i Administrative Rules are the rules adopted by the Office of Coastal Conservation Lands.

Mr. Rapozo: That was going to be my question. You referenced HAR 13-5, is that what you said?

Ms. Diamond: Yes, that is correct. That is the State rules. It is the conservation district rules because that is all that the State does have jurisdiction over and how they treat their shoreline setbacks is similar to how our original rules went where it was seventy times forty (70 x 40) and they also have the depth base chart.

Mr. Rapozo: But 13-5 would only address the conservation.

Ms. Diamond: That is right.

Mr. Rapozo: So not the setback.

Ms. Diamond: But there is no variance in that for below forty feet (40') and so as in much as we are considering going below forty feet (40') and blaming that on the State I think we can look at the State's own rule amendments and follow that and not go below forty feet (40').

Ms. Yukimura: Does the State rules go through this setback? You can do the setbacks and reduce the minimum buildable footprint?

Ms. Diamond: No, they have the depth based chart and you can use the lower of the two (2) and so while ours is more protective, more people will go into the variance section and it will become less protective.

Ms. Yukimura: The thing about going into the variance section, not necessarily less protective because you will only go down as much as

needed but the other thing is that you have all these agreements that they have to make that protect the County and also put them on notice that they cannot harden and put them on notice legally so that is the value of the variance section. For a while I was trying to keep things out of the variance section because it is more orneriest in terms of process but it does not have those protection of indemnification of the County and prohibition agreement now, they are agreeing that will not harden. Okay, thank you, Caren. Anything else on this issue? Questions? If not, is there anything, does anybody have questions just generally about this or does any member of the team want to highlight anything that we feel we need to highlight?

Mr. Rapozo: I have another question and it is for Ian. As far as the indemnification, someone signs this waiver and they get the variance and ten (10) years from now or twenty (20) years from now all of a sudden their house is getting ready to be swallowed by the sea. Let us say there is a new owner what happens in a case like that? Or what happens if, let us say this house becomes a rental, a vacation rental and we have some tourist staying in there who had no part of the waiver and something happens and God forbid they get hurt or they get killed by an event. This County allowed them to build inside the setback. How legally defensible is that?

Mr. Jung: Obviously if we are going to talk about liability we should probably do that in executive session but for the purposes of the discussion, I think if you read subparagraph "f" on page 24. There is this unilateral agreement that is required and it is recorded with the Bureau of Conveyances. With all recordation it will run with the land in terms of a covenant affecting the land itself. With regard to the indemnification provision, not only will they agree to both defend, indemnify, and hold the County of Kaua'i harmless. So if there is a resulting lawsuit then we would hold this provision to them, to the landowner.

Mr. Rapozo: And you believe we could defend that lawsuit successfully?

Mr. Jung: Obviously it all depends on the facts of the lawsuit but we would hold this and say, "Hey, you are responsible to defend this lawsuit."

Mr. Rapozo: I understand. We have the farm dwelling agreement, right? In general, we have a farm dwelling agreement, I am only using this because it is almost the same. It is an agreement between the parties, it is also recorded in the Bureau of Conveyances but it is meaningless. That is my concern. Just because it is recorded and it is...

Mr. Jung: It depends on how you call it meaningless. You have to look at the issue of farming in general and what is farming.

Mr. Rapozo: My point is one could argue and it is very difficult for us, as I have been told to defend that and I am just worried that if somebody should get hurt or killed in a property that is built within the setback

because we granted the variance knowing that there is an opportunity for that house to be damaged, I do not know how strong that waiver would be. I guess that is the real concern. It is great to have them come in a sign and Max is here, he is a private attorney. I do not know if he could address that.

Mr. Graham: The indemnification is something the homeowner signs and so the homeowner says he will indemnify the County and defend the County so if someone sues the homeowner and the County, the homeowner has to take out the defense of the County, pay the attorney's fees, cover any cost, any judgments that might be entered. So that is the homeowner's promise to the County. That agreement is recorded with the land so if the homeowner sells the land the new buyer takes subject to this agreement. The new buyer agrees to be bound by this prior agreement of the original homeowner. Now, let us say a renter is in there and gets injured. First question is does the present homeowner have the capability of defending and indemnifying the County? Second, does the homeowner have insurance that will cover such an event? Now you are in the shoreline so you have to have flood insurance, I am not sure that flood insurance has a personal injury indemnification side to is and you can have homeowners insurance that may or may not cover and you would have to ask your County Attorney's Office typically whether there is coverage or not. That is the other issue, is there any insurance coverage? It is possible the County could still get sued and it is possible the homeowner, other than having the value of the property that may be gets wiped out by a tsunami...

Mr. Rapozo: Obviously will not have the house to go borrow money against.

Mr. Graham: ...and maybe there is no insurance that covers. So that is always the problem. You make the promise and that is great. The promise is good to at least the homeowner cannot sue the County but other third parties might be able to. And then you have the whole issue of whether in the exercise of your legislative capacity in passing a law like this whether the County has any exposure at all, whether you have some immunity or what is the standard. That is another issue too.

Mr. Rapozo: I guess it goes back to the discretion of the County to grant a variance because the law is set up based on some pretty specific scientific data and then in certain cases the County will grant a variance which will get them closer to the hazard. That is my concern because now it becomes obviously more dangerous because we are moving them closer, we are allowing them to go closer to the actual hazard that we are trying to...this Ordinance is trying to protect or prevent. The amount of lawsuits I have seen, whether or not they sign a waiver, you go to a go-kart track and you sign a waiver when you get there. You go to a skating ring, you sign a waiver and then you get hurt and then you get sued. It is more than just a waiver. I think that is what we have to be cognizant of because we are actually allowing someone to get closer to the hazard and I just want to make sure that we are protected and not just with a waiver and not just with a Bureau of Conveyance recordation. I really want to explore that if possible.

Ms. Yukimura: I think the other protection might be making sure they do have insurance or flood insurance. That is already a requirement but we could still make it a condition of our agreement too, could we not?

Mr. Graham: Flood insurance, I think, typically insures the property.

Ms. Yukimura: But not life and limb?

Mr. Graham: I do not know so that is what the issue is. Can you require an insurance coverage that would protect the County against these kinds of personal injury or lawsuits?

Ms. Yukimura: Maybe you have to require homeowners insurance. Councilmember Hooser.

Mr. Hooser: Thank you, Chair. Just a couple of questions, the more we talk the more questions there are of course. Thank you, Mr. Graham for your insight. How is it possible to require insurance, making somebody pay their insurance bill and what not? I think we have experienced in the County with that, but if someone signs up for a variance, they show you the insurance certificate and then they stop paying their bill or they sell the house. The next guy owns it free and clear, and he does not have any insurance, what happens then?

Mr. Graham: Typically in the commercial world if the lessor is leasing to a lessee and wants to make sure the lessee has insurance the requirement is you get insurance, you state what the coverage's are, you state the amount of insurance, you require the insurance policy to name the lessor as the additional insured and it has a provision that the insurance cannot be canceled for a period of thirty (30) orsixty (60) days without prior notice to the additional insured. So if the lessee stops paying the lessor finds out, and then the lessor will have whatever remedies against the lessee under the lease. Now we take that over to the County, the County could of course say, you have to get insurance to the homeowner. You have to give us a certificate and update it every year. It has to be for a certain amount, certain provisions. But here is the tough part, you can say no cancellation without notice in thirty (30) or sixty (60) days then let us say the homeowner fails to make the insurance payment. Now, what is the County's remedy? Do you say that the homeowner has to vacate the residence, cannot use it?

Mr. Hooser: I guess that is the point I was trying to make. It is obviously useful in the beginning when they have to have the insurance to get whatever they are looking for but down the road it is less useful. I know everybody's role, I think Caren is here as a community volunteer or something?

Ms. Yukimura: Community advocate.

Mr. Hooser: Advocate. I was wondering Mr. Graham, are you volunteering also or are you on the clock?

Mr. Graham: I am on the clock.

Mr. Hooser: May I ask who you are...

Mr. Graham: Various property owners around the island.

Mr. Hooser: Okay. Thank you very much.

Ms. Yukimura: There is not a foolproof way to...because it hinges on certain behaviors that are addressed when something fails by a lawsuit, right? But we can try to our very best possible and all these extra provisions for indemnification, for a unilateral agreement that they will not come back to ask for hardening, etc., etc. are things that we did not do in past but we are now doing to minimize our risk. We need to talk about activities. I realized we have not talked about that. Is there anything left on this piece about variance? Go ahead, Caren.

Ms. Diamond: I just want to reiterate that I do not believe we should go below forty feet (40') in any variance but I also think it should really specify relocation. So if you are going to give any variance and the house is threatened it should be relocated.

Ms. Yukimura: That is what we are talking about. We are trying to locate it on the lot.

Ms. Diamond: No, we are talking about relocation once a house is threatened. You are talking about signing these insurance waivers and things. I am talking about...

Ms. Yukimura: Wait, are we talking about a new building or an existing building? This is what we are talking about under the variance provisions.

Ms. Diamond: Yes, we are talking about...

Ms. Yukimura: We are locating, when somebody wants a new house or when an old houses have been destroyed either by wave action or by fire...no, no wave action...we are trying to decide where to put it.

Ms. Diamond: Right, so then you can also condition that if it is threatened again it gets relocated and that was the original...these variance sections...

Ms. Yukimura: Oh. You are talking about relocated off the lot? At whose expense?

Ms. Diamond: Yes, relocating it so that you are not...you are talking about indemnifying the County and we are saying if the structure gets threatened again it gets relocated.

Ms. Yukimura: We would do that by saying no house allowed on this lot. That is how we would do it.

Ms. Diamond: But that is different than saying it is relocated after it is threatened.

Ms. Yukimura: Are you talking about government action of relocating?

Ms. Diamond: No, the landowner agreeing so that someone who wants to put their house too close will agree that they will relocate it if it becomes threatened.

Ms. Yukimura: They will either agree by not applying to rebuild or we will determine that no house can be built because it is too small and too dangerous given all of the action and then we will have a lawsuit claiming that we have denied them their basic property right. At some point the court will have to make a decision in the face of rising ocean, whether we can say there is no place for a house here because of the dynamics of shoreline erosion and so forth. That would be how it would happen.

Ms. Diamond: I guess you are not understanding what I am saying and I will try once more. Since this action is dealing with variances. If somebody has a coastal erosion rate that is very high and they have to instead get a variance and you are asking to put them down, whether it is thirty feet (30') or forty feet (40') from the shoreline. What I am saying is as a condition of granting that variance can you also put in a condition that if the house becomes threatened it gets relocated? And that would then protect from having the houses built to close to the shoreline and needing protection in the future if someone wants to build a house within that setback area.

Ms. Yukimura: So I think it is a matter of definition of whether you are going to ask them to relocate or ask them to agree that they will not rebuild. I invite you to do a proposed an amendment if you want to. Any questions of Caren on this issue? Let us move on. Ruby, you wanted to say something?

Ms. Pap: I just wanted to add to that. Just something to consider that it also might be the case that at that time the home may have been destroyed and there may be a lot of debris on the lot or on the beach itself and so that may also be a case where you may want to have some language in there to have the homeowner be responsible for cleaning up whatever is...just something to consider, that it already could be destroyed at the time.

Ms. Yukimura: Okay. We had an issue about activities. Maybe, Ian, can you explain that and then Mike you can...or Mike you said to leave it in but when we tried it just could not work. Go ahead.

Mr. Jung: When we deal with what the intent of what we are trying to do here is create a line to say where structures are going to go the issue is if you start to look at activities, and remember when a person comes in for a permit you are asking for what that structure going to be. Someone comes in for a permit for a specified use within a structure then there are separate code sections such as use permits or SMAs that deal with it. But in this particular case what we are trying to look at is where to create the line to put the structure. That is why when we looked at the activity versus structure use, although HRS 205 part 3, which is the shoreline setback, it says structure activity or facility. The intent there is to create this line and where you are going to put that structure and when you look at the definition of structure it is pretty comprehensive, it includes pipes, and things like that. So anything that is going to basically go into the ground becomes a structure. When we try to identify where do we start to create a line, the Planning Department wanted to look at specifying it for structures only because if you start trying to regulate activity, what types of activities are you going to start regulating other than what is already regulated through the SMA process.

Ms. Yukimura: A little bit of background, Act 205 has three (3) parts. The third part authorizes this shoreline setback. Is that correct? It says activities but when you think about regulating activities with a line it makes you think that it was poor drafting on the part of the State. Activities are better regulated under SMA permits. You will hear this is happening already, weddings, other beach kind of activities, commercial, whether it is surfboard sales or so forth. If they happen on private property that is just above the certified shoreline because if it is *makai* of the certified shoreline, then it is regulated by the DLNR or the County that is a part of a county park through agreements with DLNR. If it is on the private side of the certified shoreline we are regulating it through SMA permits, mainly and that is a more logical way to do it than by setting a line somewhere because the line is really more conducive to a structure. Questions?

Chair Bynum: I just did not hear an answer to the question you posed, Ian. What are you going to regulate other than what is already being regulated in the SMA? What activities and that is a key question.

Mr. Jung: You have to look at what triggers the zoning permit itself for the structure, right? If somebody is going to come in to establish the line if you keep activities in there it could be drawn as far as saying if someone is going to, and this is a poor example but someone could want to do a commercial picnic and just do a one (1) day picnic on the beach. Are they then required to come in and do some kind of certified shoreline for that picnic, for that day? The obvious answer is no. There is the possibility because that is an activity, right. The only activity we looked at in terms of what could be problematic is landscaping. The way we look at landscaping is when you start to try and impose some type of pipe for an irrigation type system which theoretically would trigger the Shoreline Setback

requirements because you are installing pipes into the ground which is a structure under there.

Chair Bynum: What if you lay the pipe above the ground?

Mr. Jung: A pipe is a pipe.

Ms. Yukimura: It is still a structure under the definition of this...

Mr. Jung: If you get to the point of trying to have every possible activity or every possible thing coming in to the Planning Department saying I need a Shoreline Setback Determination (SSD) for installation of twelve (12) papaya trees right along the shoreline area. Do we want to start regulating and being the plant police or do you want to start regulating and requiring permits for things the Planning Department historically has never asked for permits for like trees for example? The line has to be drawn at some point. What does the Planning Department do in terms of creating this line? It is for structures. If we start including activities it could be taken steps further than anticipated through the discussions we are having of what is an activity because activity is not defined anywhere.

Mr. Bynum: Let me just share a couple of thoughts and see if there are other answers from other people. I understand what you are saying but my concern is back to your question, what are we going to regulate other than what is already being regulated through the SMA process? You said landscaping and I do not know all the ins and outs of this but people planting in the shoreline is a really significant issue and problem whether it should be regulated through this law or not I do not know.

Mr. Jung: Just to answer your question, that is actually regulated through DLNR under HRS. 115 for plantings along the shore.

Chair Bynum: And we have seen some actual enforcement currently.

Mr. Jung: Yes.

Ms. Yukimura: And a recent Supreme Court Case thanks to Caren.

Chair Bynum: I am just trying to understand how these issues interplay and what is appropriate in this legislation and what is not. You are saying this is not in this legislation. This is already taken care of in other manners. That is why you want to remove activities. Have I summarized your position?

Mr. Jung: Yes.

Chair Bynum: In my notes from earlier, Caren you mentioned activities as an error and I made notes because I wanted to know more so do you have another expanded answer on this?

Ms. Diamond: Thank you, Tim. HRS 205 requires the County to do permits on structures and activities. I do not believe it is the option of the County to say, nevermind activities are allowed. I think that is a big failure in this applicability section and I believe activities needs to be added back into this law. When the law came over from Planning Commission they had taken activities out and they reinserted landscaping probably because Ian said it was the only activity he could think of. As we were going through this process, landscaping does not supplant activities. Activities can be lots of things and I will just give one (1) example. If you do not put it in here are all vacation rentals going to have weddings in the setback area? There are no regulations. There is nothing to stop them. And do you need to have anything? No. And I believe that you cannot broad brush exempt all of the activities. That is one (1) of the major problems we are having and if people move the activity off the shoreline area and now it is State jurisdiction and into the setback and County jurisdiction we better have rules for it.

Mr. Bynum: I do not want to belabor this because my understanding of today is we were kind of going to get an overview of the issues. Clearly this is an issue that I need to understand better. That I have learned from this dialogue. Thank you, Vice Chair.

Ms. Yukimura: Mike.

Mr. Dahilig: Just from a policy standpoint and looking through the presentation we gave the Council back in January of last year when this Bill was first heard by this body and we went through a series of slides kind of explaining the structure of the overall coastal zone management program. Part 2, which is our SMA permits regulates activity, part 3 regulates use.

Ms. Yukimura: You mean structure.

Mr. Dahilig: I am sorry. Structure. We do have these competing issues of how to define activity and maybe what will make it prudent for us to do is maybe provide a copy of these slides again to give the framework for the Council as to what the rub is here. I think what Caren brings up is definitely a concern but do we start addressing activity, and I have said this in the meetings that we have had where we start regulating things like picnics and people that want to go whip their pole by the shoreline. All of these things in a nutshell can be characterized as activity and from an operational and broader policy perspective of the Council, I think has to address, is what should the department be chasing here?

Ms. Yukimura: Okay. Your word, "operational" is key here. To think that even whether it is a one (1) time wedding or it is commercial weddings over a period on the lawn of a vacation rental would you get a shoreline certification? Go through that process, certainly for a one (1) time wedding does not

make sense. Operationally, whether it is a film company and there are SMA rules now about filming in the shoreline area, it makes more sense to use the SMA permit as the process. The good news is that SMA permit comes within the 205A umbrella. It is all under this State regulation of shoreline activities or structures but it seems like operationally it makes more sense to use shoreline setback for structures and SMA permits with a defined SMA area that is for activities. That is the reason right now we are not trying to address it in this shoreline setback process. Arguments can be made both ways.

Mr. Rapozo: I think the activity Caren talks about is more commercial activity versues fishing but we currently regulate commercial activity on private property in a use permit, right?

Mr. Dahilig: Yes.

Mr. Rapozo: They should not be performing these commercial activities without a permit, is that not correct?

Mr. Dahilig: Yes.

Mr. Rapozo: I am not sure, Caren what...you are saying that is not sufficient?

Ms. Diamond: Our shoreline laws always had structures and activities. It has always been a part of it and when we are looking at separating it out, I do not think it is wise to do that. It is part and partial of the shoreline stuff.

Mr. Rapozo: For me the bigger concern is the commercial use of the property versus the impact that it has on the shoreline but I think we need to make a much stronger effort in enforcing the use permits or the lack of use permits on the island because I think there is a lot of that stuff going on throughout the island and not just on coastal properties. The landscaping was another big issue because as we have both seen on several tours that I have had with you out on the north shore and I understand it has been enforced or it has been cleaned up. The State did come down and clean up a lot of that but obviously there is an attempt to expand the property by irrigation. That happens in a lot of properties on the north shore that I have seen. The irrigation pipes, I have actually pulled some of them out. I was so frustrated that they are actually on the State beach, on State property and black pipes, irrigating their lawn which is not even their lawn. That is where if that can be addressed in here I think we need to really address but the commercial activity should be strengthened in the use permit process. The landscaping does affect planting of trees and planting of irrigation to expand the lots, I think that affects the coastal processes and I think where we should...I am not sure if this is the right place but that definitely has to be addressed and it might be in this Bill.

Ms. Diamond: This Bill does clean up the landscaping, somewhat. And then just one (1) more thing. The forty foot (40'), the County's will is to prevent development in the forty foot (40') setback area so if you do not have any regulations then that role be hard to do. Preventing use, the activities from happening in that first forty feet (40') as well is something that the County could do.

Ms. Yukimura: Okay. Thank you. I think, Mason, do you have a...Coucilmember Bynum.

Mr. Bynum: Following up on this for one (1) more...you said the language has always been in the law. Are any of you aware of any contested case that involved...that centered around that language that was involved in activity and not a structure?

Ms. Diamond: The whole boating thing.

Ms. Yukimura: Mike wants the mic.

Mr. Dahilig: Let me answer your question indirectly. Maybe not a contested case but with respect to concession, surf school concessions in Hanalei Bay, we have gone through the process of issuing the County Parks Department an SMA minor permit. It is for two (2) years but it is one (1) of these ventures where we are trying to be a little more proactive in looking at the commercial activities within the SMA as a means of permitting. It is something that the Parks Department did apply through our office with and I think it is an example of where you do not have structures for surf schools but it is an activity and that activity is being regulated by under the regime of part 2 of 205 versus part 3 of 205.

Chair Bynum: I am just trying to see if whether this word being in the law has been germane to any discussion or dispute related structures not activities. I also have one more. If you had a shoreline home and you were a resident, full time resident, there are a few of those left and you wanted to throw you daughter's wedding, you would not need a permit, right?

Mr. Dahilig: (inaudiable)

Chair Bynum: But if are running a TVR and your guest wants to throw a party there do you need a permit?

Mr. Dahilig: That is a good question and...

Chair Bynum: That is the kind of question I will need answered. Enough said about this. Thank you.

Ms. Yukimura: Other questions on this issue? If not, any other questions on the proposed amendments? If not, we have two (2) weeks to look it over, talk about it, and ask questions. We will provide some more information,

Ruby, the small lots or what was it that Mason wants to know? The number of lots under one hundred feet (100') average lot depth.

Mr. Chock: Yes, that is affected by the cap. Can I clarify also? I think it was a question by Councilmember Rapozo about liability and if there any case studies on the County being affected by these variances that we were talking about. Is that is something we might be able to get some information on.

Mr. Jung: Yes, Dennis Hwang who is with Sea Grant did a pretty good exposé on the takings issue relative to shoreline issues and I think there is a section in there, if I recall which I can try to get copies for you guys.

Ms. Yukimura: Please. I would like to read that too. The other side of liability, the other side of allowing people to go into the shoreline setback area under very controlled circumstances is the idea of not allowing a house. The variances are there so that you can actually have a house there and the nuances of how big, how small, how far is what the commission will have to go through under these guidelines that we have in the Bill. But there is the other side of the liability. If you cannot site a house or if a variance is denied then the other side of the liability is the court decision that...well we do not know how far that will go but it says you have to be able to make use of your property and you have certain rights as to your property. If you say no house that will be a court case I am pretty sure. Okay? Yes, you take it back. There will need to be a move to defer.

Ms. Yukimura returned Chairmanship to Committee Chair Bynum.

Chair Bynum: Yes, I understand. Thank you very much, all of you for your participation and being here. I am sure we will see you all again.

The meeting was called back to order, and proceeded as follows:

Chair Bynum: Any discussion among Councilmembers? Councilmember Kagawa.

Mr. Kagawa: First of all, I would like to thank all of the Committee members and all of the people, even there are some who are not here today and Councilmember Nakamura has been on it for awhile now Managing Director. I would like to thank Councilmember Yukimura for taking up the ball and rolling with it. I know it is not easy to jump in midway but it looks like we are getting closer to the end. So far it is hard for me to see how these amendments really apply in real life situations or real business situations. I am relying, basically on the public and the group to give us the direction we need. Where you are talking twenty feet (20'), we know what twenty feet (20') is but to see how that affects individual homeowners, businesses, and developers is another thing. Again, I just want to thank everyone. We are seeing shoreline setback issues all over the place. Councilmember Yukimura shared with me some of the Kekaha or Waimea/Kekaha area shoreline that is really changed drastically. Wailua has changed drastically for me as well, in passing there every day. There are a lot of

instances. Oahu, on the north shore is just seeing...they are in unforeseen territory with what they are facing and homes falling in the water on the beach and what have you. I think this is a good thing that we are trying to take a safer route, trying to address this problem before it becomes a "houses falling into water" so I want to thank, again Councilmember Yukimura and the committee and hopefully we can get closer to the end. I would suggest that if Councilmembers have amendments they are pretty sure they are going to propose, that we get them to the committee and to other Councilmembers as soon as possible because this is such a difficult Bill to understand. Thank you.

Chair Bynum: Other Councilmembers? Comments? Councilmember Chock.

Mr. Chock: Thanks. I just wanted to also thank everyone for all of the work that they did. I went to about half a dozen of these meetings and was able to meet with Caren. She did at the break mentioned that it might be a good idea for here to come back when we reconvene with some slide that might help to further illustrate some of the discussion and key points that we are talking about. I would like to encourage that, if possible. Certainly what I learned in sitting in those meetings is that it is very complex issues. My hope is that because of this complexity and where we come from with it that we can continue to move in a direction that simplifies the language because it is very difficult for a laid person to read and understand like Councilmember Kagawa had suggested. I am looking forward to that and I just appreciate all of the hard work that went into it. I just wanted to clarify with Councilmember Yukimura, are we in agreement that there is a need for activities in...to keep activities in this or to separate? Because I heard you say SMA versus the things such as landscaping that might want to stay in here.

Ms. Yukimura: May I answer that?

Chair Bynum: Yes, please.

Ms. Yukimura: Actually, landscaping as Caren pointed out, the definition of landscaping has improved and I think to the extent that it affects coastal processes could be included here but I did make a decision on my part not to include activities as a work in the headings or trying to regulate it because it made more sense to me to regulated it as a SMA permit and because I think we can argue that it is...we are still abiding by the State law because it is under the umbrella of 205A I think we are okay legally and I also think operationally it makes more sense to control activities through a use permit and SMA is a use permit versus... well it is both a structure and a use permit...anyway, to focus on structures for shoreline setback. It was pointed out to me that on page 14 of the proposed amendments landscaping that artificially fixes the shoreline is prohibited in the shoreline setback area. Thank you.

Chair Bynum: Other comments by Councilmembers? If not, I want to say a few thing and then we will move on. First, I would like to recognize

former Councilmember Nadine Nakamura for beginning this process and bringing together a great collaborative group to work on these. These are complex issues. I had the fortunate, as do I think Mel and the Chair of being here when we passed the original law and going lots of...lots and lots of education about these issues. This is the *Hawai'i Coastal Hazard Mitigation Guidebook* by Dennis Hwang, who has also been involved in this process as I understand and one (1) of the people who I have learned tons from and will be consulting with about these issues. I noticed here this book has been around for awhile but two (2) of the pictures on this book, one (1) is right behind the Wailua Golf Course, where we had historic erosion right into the course and the other is a famous case in Anahola and I believe this is also Kuna Bay, so we have these issues and we have had them for many years. I am very proud of the law that we passed. Maui took the lead on this and Kaua'i took it to another level. It was a collaborative Bill and this Bill is sometimes gets characterized as the developer or the landowner versus the County or environmental activist and I do not see that at all. I see this as a Bill that primarily protects the homeowner and landowner from making decisions that are kind of irresponsible and as a society we kind of made a lot of irresponsible decisions building things too close to the shoreline and that is a relatively modern phenomenon. The old construction on the shoreline use to be back. We have all of these technical issues to work out and we will but I will be working with people like Chip Fletcher, Dolan Eversole, the Sea Grant folks. I want to recognize the Council Chair and the former Councilmembers who brought Sea Grant into our County. It was Council initiative, is my memory, that brought Sea Grant into our community and we have now the third or fourth outstanding individual servicing our community with a level of independence and that is really important. The Sea Grant folks, even though they are housed at Planning are not Planning employees. There are a lot of people who have worked so hard on this and everybody really finally has this same goal, to set the right balance. On the shoreline issues, I am going to rely on the science. That has held us really well. On the legal issues, then it gets a little more complex but we are going to hear both sides of the issue so I am very hopeful that we are going to have a Bill that is improved but it is clearly not as sweet as I thought, that everybody is going to say and we were going to pass it today because the last thing I will say here and I will close up is that I have learned that you need to listen to Caren Diamond. There has been many, many times where it seemed like she was coming from left field, to me in the past, I am just being honest, and realized later that she was one hundred percent (100%) correct and I just needed to understand the issue better so this does challenge us to dive deep and understand the issue well. This is a Bill we all should be very proud of and I think we are and I believe at the day we will pass an improved version. Thank you very much. Any other discussion? Yes, Councilmember Yukimura.

Ms. Yukimura: I am recalling something and I am remiss for not acknowledging it earlier. I think Mel was a co-introducer of the original Shoreline Setback Bill so I want to acknowledge that.

Mr. Rapozo: Thank you.

Mr. Yukimura: I think it was not a unanimous vote so it took a lot of work and a lot of people. Also, I really want to thank the team of diverse stakeholders who committed so much time to this and with the commitment of a fair, effective Bill. Dennis Hwang at last Friday's meeting took some pictures saying this is a best practice. I want to put this in my next paper, that we get all stakeholders around the table and try to craft legislation. I believe that we have come close and we still have to finish but in many ways already the amendments are proactive, preventive, and good planning so I am really thankful for all of the work that went into it and that we will continue to do until we pass a version of this Bill. And thank you to Councilmembers for taking the time today to understand and learn.

Chair Bynum: Councilmember Hooser.

Mr. Hooser: Yes, thank you, Chair. As a non committee member I appreciate the opportunity to speak and I have been listening and paying attention to the dialogue and I greatly appreciate all of the work and effort that Vice Chair has put into this as well as Committee. I do have many concerns that remain and the importance of this Bill goes without saying. Many of you have repeated that, protecting the shoreline has many implications from view plains to public safety to just preservation of our environment so it is very, very important and it is...I would much prefer as I am sure everyone here would prefer if we had unanimous support from all of the stakeholders. It is somewhat troubling when the representative for landowners and developers support the Bill and community advocates do not support the Bill. My preference would be both of them, though not entirely happy, but happy enough to move it forward. I think that is probably at the end of the day, what is a measure of legislation that is going to be in the middle or be balanced and I think if we are going to err on any side at all we would err on the side of protecting the community interest. Again, I am not on the Committee and looking forward to the further discussions and the ultimate outcome which I am confident will go toward the area that I am hopeful that it will. Thank you.

Chair Bynum: Councilmember Yukimura.

Ms. Yukimura: I just want to reassure Councilmember Hooser that there are parts of this Bill that the development community, do not support but they are not making an issue of it. They did state it in committee. We really do not agree with it but they did not want to make it a further issue. Maybe, if you like I will try to get David Arakawa here to say what he does not agree with. Just so you know, it is not like they agree with every provision it is just their choice not to make an issue. Thank you.

Chair Bynum: Did you want to follow up?

Mr. Hooser: Yes, just briefly Chair. The fact that the community advocates want to make it an issue, I think raises a level of concern even higher because if it was not significant to them I believe they would also just like, well I do not really like it but we will live with it. That is one (1) of my concerns but again I am not a committee member so I do not want to...thank you.

Chair Bynum: Any other comments? I did not ask for public testimony, it did not appear that there was anyone but I want to make sure. Is there anyone who would like to offer testimony on this? Not seeing anyone Chair will entertain a motion to defer.

Upon motion duly made by Councilmember Kagawa, seconded by Councilmember Rapozo, and unanimously carried, Bill No. 2461 was deferred.

There being no further business, the meeting was adjourned at 2:49 p.m.

Respectfully submitted,

Lori L. Marugame
Council Services Assistant I

APPROVED at the Committee Meeting held on May 7, 2014:

TIM BYNUM
CHAIR, PLANNING COMMITTEE